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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ANHEUSER-BUSCH, INC. and PENN ADVERTISING OF BALTIMORE, INC.,

Petitioners,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE CITY; KURT L. SCHMOKE, in his official capacity as Mayor of Baltimore City; CITY COUNCIL OF BALTIMORE CITY; and DAVID TANNER, in his official capacity as the General Superintendent of Zoning Administration and Enforcement,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In these cases, which involve First Amendment intermediate scrutiny under the *Central Hudson* test, the Fourth Circuit upheld a municipal ordinance that prohibits, as a criminal violation, the placement of certain truthful, nonmisleading outdoor advertisements for alcohol beverages. The questions presented are:

1. Whether a court may dismiss a commercial speech challenge on motion without conducting an independent review of the "evidence" relied on by the government to carry its burden of proof, or allowing the plaintiffs to test the government's evidence or submit contrary evidence.

2. Whether a government satisfies its burden of proof under the *Central Hudson* test (i) when it shows no more than a "reasonable" belief that a "logical nexus" exists between its restriction on speech and its asserted goal and (ii) when it fails to address obvious alternatives for achieving its goal that would impose no restriction on speech.

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PETITION FOR A WRIT OF CERTIORARI

Anheuser-Busch, Inc. and Penn Advertising of Baltimore, Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in these consolidated cases.[1]

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[1] Anheuser-Busch, Inc. is a Missouri corporation, its parent company is Anheuser-Busch Companies, Inc. and it has no nonwholly owned subsidiaries. Penn Advertising of Baltimore, Inc. is a Delaware corporation, its parent company is Penn Advertising, Inc. and it has no nonwholly owned subsidiaries.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (App., *infra*, 1a-24a) is reported at 63 F.3d 1305. The opinion of the United States District Court for the District of Maryland (App., *infra*, 25a-47a) is reported at 855 F. Supp. 811.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its judgment on August 31, 1995 (App., *infra*, 1a). The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND ORDINANCE INVOLVED

The First Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech . . . ."

Article 30, Section 10.01H of the Baltimore City Code provides, in part, that "[n]o person may place any sign, poster, placard, device, graphic display, or any other form of advertising that advertises alcoholic beverages in publicly visible locations." Section 10.01H sets forth eleven exemptions to its general ban on outdoor advertising for alcohol beverages. Article 30, Section 11.0-7 of the Baltimore City Code provides that any violation of Section 10.01H is a misdemeanor punishable by a fine of up to $1,000 a day for every day the violation continues after notification of the violation.[2]

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[2] Article 30, Sections 10.01H and 11.01-7 of the Baltimore City Code (collectively passed as Baltimore Ordinance No. 288) are reproduced in full in the Appendix (App., *infra*, 49a-58a).

STATEMENT

This petition should be granted to resolve a conflict between the Fourth Circuit's decision and this Court's decisions, which impose a meaningful burden of proof on government in First Amendment intermediate scrutiny cases, especially where government seeks to restrict commercial speech and must satisfy the fact-based *Central Hudson* test. *See* Sup. Ct. R. 10(c). The Fourth Circuit decided that petitioners' challenge to Baltimore's ordinance banning certain outdoor advertising for alcohol beverages may be dismissed under Fed. R. Civ. P. 12(b)(6), ruling that the constitutionality of the ban depends solely on the reasonableness of the conclusions drawn by the Baltimore City Council. The court thus precluded the development of a factual record in the judicial proceeding, eschewed any kind of independent judicial determination as to whether the challenged regulation trenched impermissibly on First Amendment rights, and did not require a showing that the restriction would in fact directly and materially advance the City's goals in a manner no more extensive than necessary. The decision accordingly raises profound questions regarding the role of the judiciary and the standards to be applied in assessing speech restrictions that are subject to intermediate scrutiny.

This petition also should be granted to resolve a direct conflict between the circuit courts as to a government's burden of proof under the "direct and material advancement" prong of the *Central Hudson* test. *See* Sup. Ct. R. 10(a). The Fifth, Ninth and Tenth Circuits have required government to *demonstrate in fact* that its restrictions on commercial speech will directly and materially advance its asserted goal. Other courts, including the Fourth Circuit here and the First Circuit, have required government to show only that it had a *reasonable belief* of direct and material advancement.

A. Petitioners and the Baltimore Ordinance's Restriction on Their Commercial Speech

Anheuser-Busch, Inc. ("Anheuser-Busch") is a manufacturer and distributor of alcohol and non-alcohol malt beverages. App., *infra*, 66a. To promote the sale of its brands of beer, Anheuser-Busch engages in truthful and nonmisleading advertising of its products in the various media in Baltimore, including outdoor billboards and freestanding signboards. *Id.* at 67a. In its advertisements, Anheuser-Busch adheres to the beer industry's self-imposed, voluntary guidelines designed to ensure that beer advertisements do not target minors, and frequently presents public service messages designed to promote responsible consumption or address problems such as underage drinking. *Id.* at 68a-69a.

Penn Advertising of Baltimore, Inc. ("Penn") is engaged in the business of outdoor advertising on signs located throughout Baltimore. *Id.* at 81a. Penn leases land from private property owners, erects and maintains sign structures on that land, and makes the sign structures available to its customers, including alcohol beverage producers. *Id.* All of the advertisements carried by Penn are truthful and nonmisleading. *Id.*

On January 6, 1994, Baltimore enacted Article 30, Section 10.01H of the Baltimore City Code (the "Ordinance")—an amendment to its zoning law—which bans, with numerous exemptions, outdoor advertising for alcohol beverages in most of Baltimore's zoning districts. *Id.* at 84a. The asserted purpose of the Ordinance is to reduce illegal underage drinking in Baltimore. JA1098.[3] The Ordinance specifically exempts from regulation neon or other electric signs in the windows of premises licensed to sell alcohol beverages, generic signs, signs on the hundreds of MTA buses, alcohol beverage delivery trucks and taxicabs that traverse Baltimore, signs at Memorial Sta-

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[3] The designation "JA ——" refers to the joint appendix filed in the Fourth Circuit.

dium and Camden Yards baseball stadium, signs on property adjacent to interstate highways, signs in Baltimore's central business district and, subject to certain setback provisions, signs in one designated industrial zone. App., *infra*, 56a-58a; Baltimore subsequently enacted an additional exemption to the Ordinance that allows the retail alcohol beverage outlets located throughout the city's neighborhoods to display alcohol beverage advertisements on large portions of their exterior surfaces. *Id.* at 59a-62a. In addition to its exemptions, the Ordinance does not limit in any way the other media used for advertising alcohol beverages and to which minors are regularly exposed, *i.e.*, television, radio, newspapers, and magazines.

B. The District Court Proceedings

Shortly before the Ordinance became effective, petitioners commenced separate lawsuits in the United States District Court for the District of Maryland, invoking the jurisdiction of the district court under 28 U.S.C. §§ 1331, 1332 and 1343. Among other things, petitioners sought, and still seek, a declaratory judgment that the Ordinance violates their commercial speech rights protected by the First Amendment and an injunction against enforcement of the Ordinance.[4] Soon after commencing their actions, petitioners each filed a motion for a preliminary injunction against enforcement of the Ordinance. On those

[4] The Fourth Circuit incorrectly and inexplicably characterized petitioners' complaints as raising only facial and not as-applied challenges to the Ordinance. In fact, the complaints explicitly seek relief on both grounds and contain more than sufficient allegations to support as-applied challenges. App., *infra*, 73a, 76a-77a, 81a, 88a, 98a. The complaints allege that petitioners currently place alcohol beverage advertising on billboards in Baltimore, that they intend to continue such advertisements, and that such advertisements will violate the Ordinance if it is not invalidated. *Id.* at 73a, 81a, 88a; *see, e.g., Edenfield v. Fane*, 113 S. Ct. 1792 (1993) (*"Edenfield"*); *Schwartz v. Welch*, 890 F. Supp. 565, 570-71 (S.D. Miss. 1995) (explaining that this Court does not require a plaintiff to be prosecuted before filing an as-applied challenge).

motions, petitioners submitted substantial evidence to show that Baltimore was not likely to meet its burden under the *Central Hudson* test to prove that a ban on some, but not all, outdoor advertising for alcohol beverages will directly and materially reduce underage consumption. App., *infra*, 101a-117a; JA103-795, JA1055-1084. While the preliminary injunction motions were pending, Baltimore filed motions to dismiss both actions under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Without notice to the parties, the district court converted Baltimore's motions to dismiss to summary judgment motions and granted them. Notwithstanding the detailed evidence submitted by petitioners on their preliminary injunction applications and the issues of fact they created, the court interpreted the *Central Hudson* test as requiring it to give binding deference to the Baltimore City Council's assumption that the Ordinance would achieve its goal. App., *infra*, 36a-38a.

C. The Fourth Circuit's Decision

The Fourth Circuit affirmed the district court's judgment, but did so in the context of Baltimore's motions to dismiss under Rule 12(b)(6). *Id.* at 12a. The Fourth Circuit ruled that the conversion to summary judgment was unnecessary because the district court should have applied the *Central Hudson* test without looking beyond the complaints and the Ordinance's legislative history. *Id.* Proceeding under Rule 12(b)(6), the Fourth Circuit also disregarded the evidence submitted by petitioners on their preliminary injunction motions.

Nor did the Fourth Circuit consider itself bound to accept as true the well-pleaded allegations of the complaints on Baltimore's motions to dismiss. To the contrary, the Fourth Circuit believed that, regardless of a plaintiff's allegations, a court may not subject legislative "findings" that purportedly satisfy the *Central Hudson*

test to "judicial review under a clearly erroneous standard or otherwise." *Id.* at 11a. The Fourth Circuit's refusal to engage in judicial review meant that Baltimore irrebuttably met its *Central Hudson* burden of proof by "pointing to the enactment itself and its legislative history." *Id.* In the court's view, "these are 'legislative facts,' the substance of which cannot be trumped by the fact finding apparatus of a single court." *Id.* (citation omitted). The Fourth Circuit stated that any judicial review of legislative "findings" would be an error because it "would ignore the structural separation between legislative bodies and courts and would improperly subordinate one branch to the other." *Id.* Thus petitioners were deprived of any opportunity to test Baltimore's evidence or to submit contrary evidence.

The Fourth Circuit then turned to application of the four-prong *Central Hudson* test.[5] There was no dispute under the first or second prong, as the parties agreed that petitioners' advertisements are not misleading and concern lawful activity, and that Baltimore has a substantial interest in reducing illegal underage consumption of alcohol beverages. *Id.* at 13a.

The Fourth Circuit interpreted the third prong as seeking "to elicit whether it was reasonable for the legislative body to conclude that its goal would be advanced in some material respect" by its restriction on speech. *Id.* at 14a. The court stated that the government need only show a "logical nexus" between its restriction and goal, and that it is not required "to prove conclusively that the correlation in fact exists." *Id.* at 14a, 16a.

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[5] This Court recently has described the *Central Hudson* test as having three prongs, with the former first prong—whether the restricted speech concerns lawful activity and is not misleading—now being a question that must be answered affirmatively before the test is applied. *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995). The Fourth Circuit, however, used the four-prong formulation, and this petition will follow that formulation for the sake of clarity.

In finding that the third prong was satisfied, the Fourth Circuit deferred to the Baltimore City Council's "legislative finding that the majority of research studies show a definite correlation between alcoholic beverage advertising and underage drinking." *Id.* at 16a. The court made no assessment of the relevance or reliability of Baltimore's research studies, disregarding an expert affidavit submitted on Anheuser-Busch's preliminary injunction motion which demonstrated that Baltimore had ignored the vast majority of relevant research. App., *infra*, 108a-114a. Moreover, the court acknowledged that the numerous studies attached to that expert affidavit, including a study conducted by the Federal Trade Commission in 1985, "refute a correlation between alcoholic beverage advertising and underage drinking," but still did not question Baltimore's assertions.[6] App., *infra*, 9a.

The Fourth Circuit also ignored petitioners' argument that Baltimore had not satisfied the third prong because, even if advertising could cause increased underage consumption, the Ordinance will have an insignificant impact on minors' exposure to alcohol beverage advertising. The court did not require any evidence as to the Ordinance's actual impact on such exposure, given its many exemptions and inapplicability to any other medium, as well as Baltimore's later enacted exemption for the exterior surfaces of the more than 1,500 retail alcohol beverage outlets.

The Fourth Circuit next addressed the fourth prong of *Central Hudson* which requires a restriction on speech to

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[6] The studies and other evidence ignored by the Fourth Circuit show that the dominant effect of advertising in a mature market (*i.e.*, a market for an established product, such as beer, rather than a new product) is to convince consumers to switch brands, not to increase overall consumption of the advertised product. App., *infra*, 102a-103a. Further, the studies have identified to list of factors that influence a young person's decision to drink, especially parental example and peer pressure. But advertising does not have a place on that list. JA1177-78.

be "no more extensive than is necessary" to serve the stated governmental interest. *Id.* at 18a. The court acknowledged that the Ordinance "reduce[s] the opportunities for adults to receive advertised information," and that "adults, who constitute a majority of the population, are not the object of the government's legislation." *Id.* at 19a. But the court found that Baltimore had no burden to explain its rejection of the two obvious alternatives with no impact on speech that were identified by petitioners: increasing enforcement of existing Maryland laws prohibiting sales to, and possession of alcohol beverages by, minors; and implementing and encouraging educational programs about risks associated with alcohol consumption. *Id.* at 19a-20a. Even though the Fourth Circuit admitted that "those approaches might indeed prove beneficial in reducing underage drinking," it concluded that Baltimore's decision to restrict outdoor advertising to achieve its goal, instead of an approach with no impact on speech rights, was beyond judicial review. *Id.*

Based on this minimalist view of the duty of the judiciary in a First Amendment case, the Fourth Circuit held that Baltimore had satisfied the *Central Hudson* test as a matter of law on motions to dismiss, and erroneously precluded petitioners from developing an evidentiary record on their commercial speech challenges to the Ordinance.

REASONS FOR GRANTING THE PETITION

I. THE FOURTH CIRCUIT'S HOLDING THAT THE JUDICIARY MAY NOT REVIEW A GOVERNMENT'S "PROOF" THAT PURPORTEDLY JUSTIFIES A RESTRICTION ON COMMERCIAL SPEECH RIGHTS IS UNPRECEDENTED AND CONFLICTS WITH THIS COURT'S DECISIONS

In startling conflict with this Court's decisions, the Fourth Circuit has virtually eliminated the judiciary's role in the system of checks and balances created to protect First Amendment rights from impermissible legislative re-

strictions. The Fourth Circuit held that the courts are not permitted under its view of "separation of powers" principles to subject a government's "proof" that purportedly justifies a restriction on First Amendment rights to *any* judicial review. *Id.* at 11a. But this Court has made it plain that, when a restriction on commercial speech is challenged, the courts must apply intermediate scrutiny and carefully review an evidentiary record to determine whether the government has satisfied its burden of proof under the four-prong *Central Hudson* test. If the Fourth Circuit is right, then all of this Court's decisions that have scrutinized and rejected a government's asserted justification for restricting commercial speech must be wrong. *See, e.g., Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995); *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993) ("*Discovery Network*"); *Edenfield*, 113 S. Ct. 1792; *see also Turner Broadcasting Sys., Inc. v. F.C.C.*, 114 S. Ct. 2445, 2472 (1994) (applying First Amendment intermediate scrutiny and remanding case to district court for a "more substantial elaboration" of the "predictive or historic evidence" upon which the government relied, or the introduction of "some additional evidence" that would justify its restriction on speech).

In *Rubin*, this Court emphasized that it is "critical" under *Central Hudson* for the courts to require the government to "*demonstrate* that the harms it recites are *real* and that its restriction will *in fact* alleviate them to a material degree." 115 S. Ct. at 1592 (emphasis supplied) (*quoting Edenfield*, 113 S. Ct. at 1800). As recently as this past June, the Court stressed its own "scouring [of] the record" developed in the trial court, and the lack of any evidence from plaintiffs in that record, before upholding a restriction imposed by the Florida Bar on lawyers' direct-mail communication with recent victims of accidents and their families. *Florida Bar*, 115 S. Ct. at 2378. *See Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.").

Similarly, the Court has held in other First Amendment "intermediate scrutiny" contexts that the courts must not automatically defer to a legislative "finding" that purportedly justifies a restriction on speech. *Turner Broadcasting Sys., Inc.*, 114 S. Ct. at 2471 (plurality opinion) (stressing that, in First Amendment cases, "deference afforded to legislative findings does 'not foreclose our independent judgment of the facts bearing on an issue of constitutional law' " (citations omitted)); *Sable Communications of Calif., Inc. v. F.C.C.*, 492 U.S. 115, 129 (1989) (same).

The Fourth Circuit's *Central Hudson* analysis directly conflicts with this Court's rejection of uncritical deference to a government that restricts First Amendment rights. According to the Fourth Circuit, a court applying *Central Hudson* may not "subject legislative findings themselves to judicial review under a clearly erroneous standard or otherwise," and may not act as finder of fact to "trump" the "legislative facts" that the sponsors of a restriction on speech insert in its legislative history. App., *infra*, 11a. This overarching conflict between the Fourth Circuit's decision and this Court's decisions extends to three specific aspects of the Fourth Circuit's application of *Central Hudson*: its unprecedented use of a Rule 12(b)(6) motion to decide a commercial speech case; its interpretation of *Central Hudson*'s third prong; and its interpretation of the fourth prong of that test.

A. The Dismissal under Rule 12(b)(6)

Not surprisingly, counsel has been unable to locate any decision by a federal court—other than the Fourth Circuit's—that relied on Rule 12(b)(6) to dismiss a complaint challenging a governmental restriction on commercial speech. The absence of any other Rule 12(b)(6) decisions is due to this Court's requirement that the government—the defendant in commercial speech actions—carries the burden of proof to satisfy the fact-laden third and fourth prongs of *Central Hudson*. *See Ibanez v.*

Florida Dep't of Business & Professional Regulation, 114 S. Ct. 2084, 2089 (1994) (describing the government's burden as "not slight"). Quite apart from constitutional considerations, where a complaint sufficiently alleges the elements of an impermissible restriction on commercial speech, as here, those allegations must be accepted as true in considering a government's Rule 12(b)(6) motion, and the government must be put to its proof. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Similarly, if the government makes a *prima facie* showing under the third and fourth prongs, then the plaintiff must be given an opportunity to test the government's proof and to refute that showing with contrary evidence. The proof requirements imposed by this Court on a government under *Central Hudson* are antithetical to dismissal of a well-pleaded complaint on a Rule 12(b)(6) motion.

This Court's consistent practice—ignored by the Fourth Circuit—has been to decide commercial speech cases based on the factual record developed in the trial court, including evidence submitted by the plaintiff. *See Edenfield*, 113 S. Ct. at 1800-03 (invalidating a ban on in-person solicitation by CPAs after considering plaintiff's submissions of an affidavit, scholarly literature and professional publications); *Discovery Network*, 113 S. Ct. at 1508-11 (invalidating a ban on newsracks distributing commercial handbills after considering plaintiff's evidence of the percentage of total newsracks actually affected); *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2706 (1993) (upholding a ban on certain broadcast advertising, but only after considering the detailed record evidence concerning the ban's actual impact). Indeed, the Court's decision in *Florida Bar* hinges on the failure of plaintiffs to submit evidence to the trial court that contradicted the Bar's submissions. *Florida Bar*, 115 S. Ct. at 2378 (stating that plaintiffs "at no time refuted" the Florida Bar's showing); *id.* at 2380 (stating that plaintiffs did not "point[] to" any contrary evidence); *id.* at 2381 (stating that the Bar's study was "unrebutted by respondents below").

In conflict with this Court's decisions, the Fourth Circuit's Rule 12(b)(6) approach transforms the untested, self-serving legislative "history" of a local ordinance, which bans speech based on its content, into an irrebuttable presumption of constitutionality. The Fourth Circuit's analysis makes a mockery of this Court's frequent reiteration of the government's burden of proof in commercial speech cases, and strips the *Central Hudson* test of its power to protect speech through independent judicial oversight and review.

B. The Third Prong: Direct and Material Advancement

The Fourth Circuit's treatment of the fact-intensive third prong of *Central Hudson* is clearly at odds with this Court's decisions. Under the *Edenfield* standard for the third prong, this Court requires a government to "*demonstrate* that the harms it recites are real and that its restriction will *in fact* alleviate them to a material degree." *Rubin*, 115 S. Ct. at 1592 (emphasis supplied; citation omitted); *see Ibanez*, 114 S. Ct. at 2089 (same); *Edenfield*, 113 S. Ct. at 1800 (same); *see also Turner Broadcasting Sys., Inc.*, 114 S. Ct. at 2470-71 (same in context of *O'Brien* test). In contrast, the Fourth Circuit stated that a government only needs to show that it "reasonably" concluded that a "logical nexus" exists between its restriction on speech and its asserted purpose. App., *infra*, 14a, 16a.

Based on its greatly diluted standard for the third prong, the Fourth Circuit did not require development of a record of empirical evidence addressing whether advertising has any impact on alcohol beverage consumption in general or on illegal underage consumption in particular. Nor did the court allow petitioners to develop and submit evidence on the important factual issue of what impact the Ordinance will actually have on the exposure of Baltimore's minors to alcohol beverage advertising, given its myriad exemptions, lack of application to any medium other than outdoor advertising, and Baltimore's

later enacted exemption for signs on the exterior surfaces of retail alcohol beverage outlets.[7] *See Discovery Network*, 113 S. Ct. at 1510 (regulation that had only "minute" or "paltry" effect did not materially advance statute's purpose). Rather, the Fourth Circuit found that Baltimore carried its burden of justifying the Ordinance merely "by pointing to the enactment itself and its legislative history." App., *infra*, 11a. But this Court's "cases require something more than a few pages of self-serving and unsupported statements by the [government] to demonstrate that a regulation directly and materially advances the elimination of a real harm when the [government] seeks to suppress truthful and nondeceptive speech." *Florida Bar*, 115 S. Ct. at 2384 (Kennedy, J., dissenting); *see Rubin*, 115 S. Ct. at 1593 (finding that the government did not satisfy the third prong when it failed to submit *convincing* evidence).

The Fourth Circuit's constricted interpretation of its role under the third prong also conflicts with this Court's delineation of a court's duties under the Federal Rules of

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[7] If the Fourth Circuit had not precluded petitioners from developing an evidentiary record, they would have taken discovery to determine, *inter alia*, the actual impact of the Ordinance on the types and number of alcohol beverage advertisements that minors in Baltimore will continue to encounter (1) in the windows and on the exterior walls of the more than 1,500 retail establishments located throughout Baltimore's neighborhoods, JA108, (2) in Camden Yards baseball park and Memorial Stadium, (3) on the MTA buses that are used to transport thousands of minors to school, App., *infra*, 120a, (4) on the alcohol beverage delivery trucks and 1,055 taxicabs that traverse the City, JA108-09, (5) on television and radio, and (6) in magazines, newspapers and other publications. *See* App., *infra*, 56a-58a. The importance of such evidence in commercial speech cases is demonstrated by *Discovery Network*, where this Court invalidated Cincinnatti's ban on commercial newsracks that had been passed for the asserted purpose of promoting urban aesthetics. 113 S. Ct. at 1510-11. Based on a factual record of the sort that petitioner fully expected to develop here, the Court found that the ban was ineffective and failed the *Central Hudson* test because its net effect was to remove only 62 newsracks, while about 1,500-2,000 remained on the streets. *Id.* at 1510.

Evidence. The Fourth Circuit refused to make any determination of the relevance and reliability of the social science reports referred to in the preamble to the Ordinance which were cited in Baltimore's motions to dismiss as its "proof" under the third prong. This Court held, however, in *Daubert v. Dow Merrell Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2795 (1993), that under the Federal Rules of Evidence the courts "must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." Not surprisingly, the Fourth Circuit's refusal to fulfill its "gatekeeping" obligation under the Rules resulted in a decision based on unreviewed "evidence" which, petitioners argued below, would be shown at trial to be unreliable and contrary to the mainstream of scientific thought. But petitioners were denied the opportunity to do so or to develop at a trial the evidence summarized in the affidavits that they submitted on their preliminary injunction motions. *See, supra*, at 8 & n.4. Because of the importance of First Amendment rights, the duties imposed by the Rules of Evidence on federal courts applying the *Central Hudson* test must be at least as rigorous as *Daubert* imposes in other kinds of civil actions. *Cf. New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (First Amendment requires higher "clear and convincing" evidence standard in public official libel context).

C. The Fourth Prong: No More Extensive Than Necessary

The Fourth Circuit's refusal to engage in judicial review of Baltimore's asserted justification for banning speech also led to a conflict with this Court's application of the fourth prong of *Central Hudson*, which requires a government to show that its restriction on speech is "no more extensive than necessary to serve [the asserted] interest." *Ibanez*, 114 S. Ct. at 2088. This Court has held that the fourth prong is not met if there are "obvious less-burdensome alternatives to the restriction on commercial speech." *Discovery Network*, 113 S. Ct. at 1510 n.13; *see Florida Bar*, 115 S. Ct. at 2380; *Rubin*, 115 S. Ct.

at 1593-94. For example, when the Court in *Rubin* invalidated the federal government's ban on disclosure of alcohol strength on malt beverage labels, it found that the government had failed the fourth prong because it did not consider, *inter alia*, the alternative of directly limiting the alcohol content of beers. *Id.*

The Fourth Circuit's decision directly conflicts with *Discovery Network*, *Florida Bar* and *Rubin* by refusing to review Baltimore's failure to consider "obvious less-burdensome alternatives" to its restriction on outdoor advertising. According to the Fourth Circuit, "it is not an acceptable response to the approach taken by the City of limiting advertising exposure to say that the City must abandon altogether an approach that directly advances its goal." App., *infra*, 20a.

In these cases, the Fourth Circuit recognized that illegal underage alcohol consumption "might indeed" be reduced by two alternatives identified by petitioners: better enforcement of existing laws that prohibit sales to, and possession of alcohol beverages by, minors; and implementation and encouragement of educational programs about risks associated with alcohol consumption. *Id.* at 19a. The Fourth Circuit also expressed concern about the breadth of the Ordinance's ban because it reduces the opportunities for alcohol beverage marketers to communicate with adults, who obviously are not the object of Baltimore's concern about underage drinking. *Id.*; *see Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73-74 (1983) (invalidating ban on the mailing of unsolicited advertisements for contraceptives because the "government may not 'reduce the adult population . . . to reading only what is fit for children.'" (citation omitted)). Nevertheless, the Fourth Circuit deemed the suggested alternatives to the Ordinance—which would impose no restriction on communication with adults—irrelevant under the fourth prong, choosing to defer once again to the legislature's selection of a restriction on speech. App.,

infra, 19a-20a. Here too the Fourth Circuit's interpretation of Central Hudson virtually eliminates the courts' role in protecting commercial speech rights from legislative encroachment and comes dangerously close to the long discredited rationale of deference to legislative judgment set forth in *Gitlow v. New York*, 268 U.S. 652 (1925). *See Sable Communications of Calif., Inc.*, 492 U.S. at 129; *Landmark Communications, Inc.*, 435 U.S. at 843.

II. THIS COURT SHOULD RESOLVE A CONFLICT IN THE CIRCUIT COURTS AS TO THE APPLICABLE STANDARD OF PROOF UNDER THE "DIRECT AND MATERIAL ADVANCEMENT" PRONG OF *CENTRAL HUDSON*

The circuit courts are in conflict as to the standard of proof to be applied under the third prong of *Central Hudson*. Since the *Edenfield* decision in 1993, this Court has described the government's burden in terms of a demonstration "in fact" that the restriction on speech will alleviate the asserted harm to a material degree. *Rubin*, 115 S. Ct. at 1592. Some circuit courts have adhered to that standard and have applied it in a manner consistent with their usual practice in civil actions: the party with the burden, *i.e.*, the government, must prove its case by a preponderance of the admissible evidence. *See, e.g., MD II Entertainment, Inc. v. City of Dallas*, 28 F.3d 492 (5th Cir. 1994); *Cal-Almond, Inc. v. United States Dep't of Agric.*, 14 F.3d 429 (9th Cir. 1993); *Adolph Coors Co. v. Bentsen*, 2 F.3d 355, 357 (10th Cir. 1993), *aff'd sub nom. Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995). Other circuit courts, however, have disregarded the *Edenfield* "demonstration in fact" standard and relied instead on language in two of this Court's earlier decisions, *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 342 (1986), and *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 509 (1981) (plurality opinion), that de-

scribed the government's burden in terms of showing the "reasonableness" of its belief of direct advancement. *See, e.g.*, App., *infra*, 20a (Fourth Circuit's decision); *44 Liquormart, Inc. v. Rhode Island*, 39 F.3d 5, 7 (1st Cir. 1994), *petition for cert. granted*, 115 S. Ct. 1821 (1995); *see also National Council for Improved Health v. Shalala*, 893 F. Supp. 1512 (D. Utah 1995).

In *Cal-Almond*, the Ninth Circuit invalidated a government program that required individual almond growers to pay assessments for government-sponsored advertising that was designed to increase total almond sales. 14 F.3d at 432-33. In rejecting an argument that it should defer to the government's purportedly reasonable judgment under the third prong, the court stated that "we may not simply defer to legislative and executive judgment on this question; we must determine ourselves whether the program directly advances [the government's] asserted interests." *Id.* at 437. Similarly, the Fifth Circuit in *MD II Entertainment* invalidated a restriction on advertising for topless bars after quoting the *Edenfield* standard, reviewing the parties' evidentiary submissions, and finding a "failure of proof on this record." 28 F.3d at 496-97. *See Adolph Coors Co.*, 2 F.3d at 357 (stating that *Edenfield* "articulates a standard that is . . . much stricter than the 'reasonably believed' standard the Government would have us adopt").

In contrast, the Fourth Circuit never referred to the *Edenfield* standard. Instead, it cited this Court's decisions in *Posadas* and *Metromedia* for the proposition that Baltimore only needed to show that it "reasonably" believed that its Ordinance will directly and materially reduce underage drinking.[8] App., *infra*, 14a-16a. Similarly,

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[8] The Fourth Circuit also cited the Court's decision in *Edge Broadcasting* to support its adoption of a "reasonable belief" standard. App. *infra*, 15a. In fact, the *Edge Broadcasting* Court did not describe its standard for the third prong in terms of "reasonableness." The Fourth Circuit might have been confused by the *Edge Broadcasting* Court's citation to *Posadas* in its third prong analysis,

the First Circuit in *44 Liquormart* upheld Rhode Island's ban on price advertising for alcohol beverages by relying on *Posadas* for the proposition that the standard of proof under the third prong "is not correctness, it is reasonableness." 39 F.3d at 7.

A court's application of a "reasonable belief" standard of proof to the third prong, rather than the *Edenfield* "demonstration in fact" standard, will have a dispositive impact on its decision and will invariably favor the government. The lower courts require guidance from this Court as to whether the *Edenfield* standard—as reiterated in *Ibanez, Rubin* and *Florida Bar*—has superseded the "reasonableness" language of *Posadas* and *Metromedia.*

III. UNLESS CORRECTED BY THIS COURT, THE FOURTH CIRCUIT'S DECISION WILL ENCOURAGE GOVERNMENTS AT ALL LEVELS TO IMPERMISSIBLY RESTRICT COMMERCIAL SPEECH RIGHTS

As this Court stated in *Rubin*, "the free flow of commercial information is 'indispensable to the proper allocation of resources in a free enterprise system' . . .," and "a 'particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate.'" 115 S. Ct. at 1589 (citations omitted; second ellipses in original). Accordingly, the courts are required to hold a would-be regulator of speech to a meaningful burden of proof, especially when it is motivated, as here, by a paternalistic desire to manipulate behavior through censorship. *See Florida Bar*, 115 S. Ct. at 2379 n.2. Under the standards employed in the Fourth Circuit's decision, however, the courts will provide virtually no

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113 S. Ct. at 2707, as somehow implying continuing approval of the *Posadas* Court's "reasonably believed" language. In any event, these cases provide an opportunity for this Court to clarify the significance of the citation to *Posadas* in *Edge Broadcasting.*

protection for commercial speech rights. Whenever a government crafts a self-serving legislative history, and regardless of whether the "proof" identified in that history to justify a restriction on speech is actually relevant or reliable, the government will prevail on a motion to dismiss against virtually any commercial speech challenge. The First Amendment rights of commercial speakers to communicate truthful information to the public, and the public's right to receive that information, are too important to allow the Fourth Circuit's regressive decision to stand.

The Fourth Circuit effectively invited this Court's attentention by employing language and concepts with far-reaching implications. Its decision is not simply about billboards in Baltimore, but about the principle of "separation of powers" as it applies in the context of the Bill of Rights. By holding that the courts cannot engage in judicial review of legislative "findings" that purportedly support a restriction on First Amendment rights ("[t]o do so would ignore the structural separation between legislative bodies and courts and would improperly subordinate one branch to the other," App., *infra*, 11a), the Fourth Circuit significantly departed from the intent of the Framers: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles *to be applied by the courts.*" *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (emphasis supplied).

The danger of the Fourth Circuit's complete deference to the conclusions of Baltimore's City Council is underscored by the statistic that the vast majority of governmental units—86,692 of a total 86,743 in 1992—operate at the local level, *i.e.*, county, city, town and various other local boards and commissions. U.S. Dep't of Commerce, *Statistical Abstract of the U.S.* 291 (113th ed. 1993).

The individuals who legislate at the local level often do so only part-time and may lack the means to engage in thorough fact-finding. Under the Fourth Circuit's decision, commercial speakers whose rights are being restricted will have no meaningful recourse to the courts from a local legislature's ill-considered conclusion that facts exist to justify the enactment of a restriction on speech rather than an alternative with no or less impact on speech.

Even more troubling, the Fourth Circuit's decision will primarily affect those commercial speakers whose products or messages are unpopular with some voters. Constitutional concerns are often put aside by elected legislators who are confronted by vocal blocs of voters with particular agendas or the complaints of single-issue pressure groups. *See, e.g., City of Ladue v. Gilleo*, 114 S. Ct. 2038 (1994). But, as this Court has held, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *see Bolger*, 463 U.S. at 71. In these cases, Baltimore passed its Ordinance because billboard advertising for alcohol beverages is unpopular with a few vocal community groups, who actually may have been motivated by concerns other than underage drinking, such as "community empowerment." JA1109-10, JA1164. Unless reversed by this Court, the Fourth Circuit's rubber-stamp approach to Baltimore's restriction on First Amendment rights will encourage other would-be regulators of unpopular speech.

The questions raised here bear directly on similar bans on the advertising of "unpopular" products that are currently being considered across the nation. *The Wall Street Journal* reported that these cases are "being closely watched by several other cities considering similar bans, and in Cincinnati, where nearly identical billboard restrictions are under legal fire." Milo Geyelin, Wall St.

J., Sept. 7, 1995, at B2. Other governments that currently are considering content-based bans on alcohol beverage advertisements on billboards include Oakland, California; Contra Costa County, California; Cleveland, Ohio; Pittsburgh, Pennsylvania; Memphis, Tennessee; and Washington, D.C. It is not surprising that the cities of Cincinnati, San Francisco and San Jose appeared as *amici* in support of Baltimore in the Fourth Circuit.

Baltimore's Ordinance reflects a widespread undervaluing of the free speech rights of consumers, manufacturers and marketers of alcohol beverages. Too many of the circuit and state courts, joined now by the Fourth Circuit, have been distorting this Court's commercial speech jurisprudence to uphold restrictions on alcohol beverage advertising. *See, e.g., 44 Liquormart, Inc.*, 39 F.3d 5; *Pennsylvania State Police, Bur. of Liquor Cont. Enforcement v. Hospitality Invs. of Phila., Inc.*, 650 A.2d 854 (Pa. 1994), *petition for cert. filed*, 63 U.S.L.W. 3574 (U.S. Jan. 20, 1995) (No. 94-1247); *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738 (5th Cir. 1983) (*en banc*), *cert. denied*, 467 U.S. 1259 (1984); *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490 (10th Cir. 1983), *rev'd on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984). Two such cases, *44 Liquormart* and *Pennsylvania State Police*, are currently pending before this Court. The importance of the Fourth Circuit's decision was understood by counsel for petitioners in *44 Liquormart*, who aptly characterized it as "a misapplication of the 'rational basis' test for economic regulation to a ban on commercial speech." Reply Brief for Petitioners at 18 (citation omitted).

This Court's eventual decision in *44 Liquormart* (scheduled for oral argument on November 1, 1995) will not necessarily be determinative in the instant cases. Unlike the Fourth Circuit, the First Circuit in *44 Liquormart* relied on the Twenty-first Amendment to reduce the government's burden of proof under *Central Hudson* when the restricted speech concerns alcohol beverages; also

unlike the Fourth Circuit, which decided these cases on Rule 12(b)(6) motions without allowing for the development of an evidentiary record, the First Circuit upheld Rhode Island's ban on price advertising only after a bench trial. The Fourth Circuit's decision raises issues that are far more corrosive of First Amendment protection of commercial speech than does the First Circuit's decision. The Fourth Circuit in no way limited its reasoning to alcohol beverage advertising and constructed a substantive and procedural rationale that would result in dismissal of virtually all commercial speech challenges at the pleading stage. Thus, this petition should be granted independently of *44 Liquormart*; at a minimum, however, this petition should be held pending this Court's decision in *44 Liquormart* and consideration of whether that decision provides guidance in these cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

[Decided Aug. 31, 1995]

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 94-1431

ANHEUSER-BUSCH, INCORPORATED,
Plaintiff-Appellant,

v.

KURT L. SCHMOKE, in his official capacity as Mayor of Baltimore City; MAYOR AND CITY COUNCIL OF BALTIMORE CITY; CITY COUNCIL OF BALTIMORE CITY; DAVID TANNER, in his official capacity as the General Superintendent of Zoning Administration and Enforcement,
Defendants-Appellees,

and

JOHN JOSEPH CURRAN,
Attorney General of the State of Maryland,
in his official capacity,
Defendant.

THE ASSOCIATION OF NATIONAL ADVERTISERS, INCORPORATED; THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES; THE MEDIA INSTITUTE; NATIONAL ASSOCIATION OF BROADCASTERS; THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION; WASHINGTON LEGAL FOUNDATION; CENTER FOR SCIENCE IN THE PUBLIC INTEREST; COALITION FOR BEAUTIFUL NEIGHBORHOODS; BALTIMORE CITY WIDE LIQUOR COALITION FOR BETTER LAWS AND REGULATIONS,
Amici Curiae.

No. 94-1432

PENN ADVERTISING OF BALTIMORE, INCORPORATED,
Plaintiff-Appellant,

v.

JOHN JOSEPH CURRAN,
Attorney General of the State of Maryland,
in his official capacity,
Defendant.

THE ASSOCIATION OF NATIONAL ADVERTISERS, INCORPORATED; THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES; THE MEDIA INSTITUTE; NATIONAL ASSOCIATION OF BROADCASTERS; THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION; WASHINGTON LEGAL FOUNDATION; CENTER FOR SCIENCE IN THE PUBLIC INTEREST; COALITION FOR BEAUTIFUL NEIGHBORHOODS; BALTIMORE CITY WIDE LIQUOR COALITION FOR BETTER LAWS AND REGULATIONS,
Amici Curiae.

Appeals from the United States District Court
for the District of Maryland, at Baltimore.
John R. Hargrove, Senior District Judge.
(CA-94-117-HAR, CA-94-145-HAR)

OPINION

NIEMEYER, Circuit Judge:

We decide in this case whether Ordinance 288 enacted by the Mayor and City Council of Baltimore, Maryland, prohibiting the placement of stationary, outdoor "advertising that advertises alcoholic beverages" in certain areas

of the City, violates the First and Fourteenth Amendment protections of commercial speech. The district court concluded, after applying the four-part test for evaluating commercial speech announced in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), that the ordinance did not violate the Constitution,[1] and we now affirm.

I

Under Maryland law, it is illegal to sell any alcoholic beverage to, or to obtain any alcoholic beverage for, a person under 21 years of age. It is also illegal for a person under 21 years of age to obtain, possess, or control an alcoholic beverage. Md. Code, Art. 27, §§ 400-403A. To advance the state's interest in those prohibitions and to promote "the welfare and temperance of minors exposed to advertisements for alcoholic beverages," the Maryland legislature authorized the Mayor and City Council of Baltimore (collectively "Baltimore") to adopt an ordinance restricting the placement of signs that advertise alcoholic beverages in "publicly visible locations," *i.e.* on "outdoor billboards, sides of buildings, and freestanding signboards." Md. Code, Art. 2B, § 222. The authorization, however, contains 10 limitations which prohibit Baltimore from restricting such advertising on, for example, buses, taxicabs, commercial vehicles used in the transportation of alcoholic beverages, and signs at businesses licensed to sell alcoholic beverages, including professional sports stadiums.

In January 1994, Baltimore exercised the authority granted it by the State and enacted Ordinance 288 prohibiting the outdoor advertising of alcoholic beverages in

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[1] The district court also concluded that the protection afforded by Article 40 of the Maryland Declaration of Rights is no broader than that afforded by the First Amendment and that therefore the ordinance also did not violate the Maryland Constitution. That ruling is not appealed.

certain locations in Baltimore City.[2] The prohibition in the ordinance is subject to the same 10 exceptions specified in the State's authorizing statute, and it also includes an exception permitting such advertising in certain commercially and industrially zoned areas of the City. By its terms, the ordinance was to become effective February 5, 1994.

Before enacting the ordinance, the Baltimore City Council conducted public hearings, receiving testimony and previously conducted studies detailing the adverse effects on minors of alcohol consumption and the correlation between underage drinking and the advertising of alcoholic beverages.[3] While one of the studies, the report of the Governor's Prevention Committee, acknowledged that certain studies advanced by the alcohol beverage and advertising industries showed no correlation between alcohol advertising and underage drinking, it concluded that the overwhelming majority of research studies showed a definite correlation. To combat underage drinking, the

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[2] The core provision of the ordinance provides:

> Alcoholic beverage advertisements. No person may place any sign, poster, placard, device, graphic display, or any other form of advertising that advertises alcoholic beverages in publicly visible locations. In this section "publicly visible locations" includes outdoor billboards, sides of buildings, and free standing signboards.

Baltimore City Code, Art. 30 (zoning), § 10.0-1(H).

[3] The preamble to the ordinance refers to at least four studies considered by the City Council: (1) a report by the Prevention Committee of the Governor's Drug and Alcohol Abuse Commission, entitled "The Impact of Alcohol Advertising and the Use of Alcohol in Television Programs and Films on Underage Drinking"; (2) the "1992 Maryland Adolescent Drug Survey" conducted by the Maryland State Department of Education; (3) a report of the U.S. Inspector General, Department of Health and Human Services, entitled "Youth and Alcohol: Dangerous and Deadly Consequences"; and (4) a report of the U.S. Inspector General, Department of Health and Human Services, entitled "Youth and Alcohol: Drinking and Crime."

Prevention Committee's report recommended, among other things, that communities regulate alcoholic beverage advertising on billboards.

In the preamble to the ordinance, the City Council summarized its findings in support of the ordinance. The City Council found, for instance, that the consumption of alcoholic beverages is involved in at least one-half of all the major causes of death among youth and that about one-third of all juvenile males arrested said they had consumed alcohol within the previous 72 hours. In concluding that a connection exists between underage drinking and the widespread advertising of alcoholic beverages, the City Council found that alcoholic beverages are the second most heavily advertised products in America (after cigarettes), and that outdoor billboards are a "unique and distinguishable" medium of advertising which subjects the public to involuntary and unavoidable forms of solicitation. The City Council noted that children are exposed to the advertising of alcoholic beverages "simply by walking to school or playing in their neighborhood" and that children's "attitudes favorable to alcohol are significantly related to their exposure to alcohol advertisements." The City Council pointed to the Prevention Committee's report that the " 'overwhelming majority' of research studies showed a definite correlation between alcohol advertising and underage drinking" and concluded that "[a]n ordinance restricting the placement of advertisements for alcoholic beverages in publicly visible locations within Baltimore City is necessary for the promotion of the welfare and temperance of minors exposed to such advertisements." Attempting to tailor its ban, the City Council allowed advertising of alcoholic beverages in commercial and industrial areas, stating that it was "narrowly focus[ing] its efforts on those advertisements which most directly affect minors where they live, attend school, attend church and engage in recreational activities."

On January 14, 1994, several weeks before the ordinance was to become effective, Anheuser-Busch, Inc., filed suit in federal court, facially challenging the constitutionality of the ordinance under the First and Fourteenth Amendments. It also challenged the ordinance as it might be applied to public service messages which Anheuser-Busch typically sponsors. One week later, Penn Advertising of Baltimore, Inc., filed a similar suit.

Anheuser-Busch is the nation's largest brewer of beers and malt beverages, producing approximately 15 different brands, including Budweiser, Michelob, and Busch. It advertises in all media, including outdoor billboards and displays. In addition to contending that there is no correlation between alcoholic beverage advertising and underage drinking, Anheuser-Busch asserts that the purpose of its advertising is "to solidify brand loyalty and increase market share by shifting adult beer drinkers from other brands to the advertised brand of beer." In its complaint, Anheuser-Busch alleges that it promotes its brands of beer on dozens of billboards in Baltimore and that on seven it publishes public service messages such as, "Know when to say when" and "Let's stop underage drinking before it starts." These public service messages typically include a corporate or product logo of Anheuser-Busch.

Penn Advertising is engaged in the business of placing advertising on outdoor advertising signs located throughout Baltimore. It leases land from private property owners, erects and maintains outdoor sign structures on those locations, and rents these signs to its customers, including Anheuser-Busch.

Shortly after commencing these actions, Anheuser-Busch and Penn Advertising filed a motion for a preliminary injunction to enjoin enforcement of Ordinance 288 pending the litigation, and the district court issued a stay of the ordinance's enforcement. The Mayor and City Council of Baltimore filed motions to dismiss the actions under Federal Rule of Civil Procedure 12(b)(6) on the

grounds that the ordinance is (1) protected by the Twenty-First Amendment and (2) a proper regulation of commercial speech under the framework established in *Central Hudson*. Baltimore attached to its motions the legislative history of Ordinance 288, including the transcript of the hearings before the City Council and copies of four studies that were considered by the Council.

Following a hearing, the district court issued an opinion upholding the constitutionality of the ordinance, *Anheuser-Busch, Inc. v. Schmoke*, 855 F. Supp. 811 (D. Md. 1994). The court also continued its stay of the ordinance's enforcement pending appeal. Contrary to the parties' entreaties that the district court treat Baltimore's motion only as a 12(b)(6) motion, the court concluded in its opinion that because it considered matters outside of the pleadings, it would treat Baltimore's motion to dismiss as a motion for summary judgment under Rule 56. On the merits, the court found that "a reasonable fit exists between the Ordinance and the City's asserted interests," *Id.* at 820, and that billboards "loom[] over children every day while they walk to school, and every time they play in their neighborhood, thus forming an inescapable part of their daily life. . . . Billboard advertisements thus form a constant impetus to consume the product being advertised, the precise goal of the advertisement." *Id.* at 822. The court held the ordinance constitutional after concluding that it "directly advances the City's asserted interest in promoting the welfare and temperance of minors" and is "narrowly tailored" to that end. *Id.* at 818. Having found the ordinance constitutional under the framework set out in *Central Hudson*, the court did not address Baltimore's argument that the ordinance was protected by the Twenty-First Amendment.

On appeal, Anheuser-Busch and Penn Advertising contend that the district court erred by converting Baltimore's motions to dismiss into motions for summary judgment without allowing them a reasonable opportunity to sub-

mit all materials pertinent to consideration of a motion for summary judgment. On the merits, they argue that the ordinance is unconstitutional on its face because (1) it does not directly and materially advance the government's interest in promoting temperance of minors and (2) it is not narrowly tailored to serve that purpose.[4] They also argue that, as applied, the ordinance would impermissibly restrict their noncommercial speech.

II

We address first the contention that the district court erred in converting Baltimore's motions to dismiss into motions for summary judgment without first providing the parties an opportunity to conduct discovery and to submit all pertinent materials to the court. Anheuser-Busch and Penn Advertising contend that they had no indication that the district court had converted the motions to dismiss into motions for summary judgment until the court issued its memorandum opinion.

Federal Rule of Civil Procedure 12(b) provides in relevant part:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, *and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.*

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[4] Amici curiae briefs, addressing principally the facial challenge under the First Amendment, were received from the Association of National Advertisers, Inc., the American Association of Advertising Agencies, The Media Institute, the National Association of Broadcasters, the Thomas Jefferson Center for the Protection of Free Expression, the Coalition for Beautiful Neighborhoods, the Baltimore City Wide Liquor Coalition for Better Laws and Regulations, and the Center for Science in the Public Interest.

(Emphasis added). We have held that a court choosing to treat a motion to dismiss as one for summary judgment errs if it fails to provide the parties with notice and a reasonable opportunity to present their positions under Rule 56. *See Gay v. Wall*, 761 F.2d 175, 178 (4th Cir. 1985); *Plante v. Shivar*, 540 F.2d 1233, 1235 (4th Cir. 1976); *Johnson v. RAC Corp.*, 491 F.2d 510, 513 (4th Cir. 1974).

In ruling on Baltimore's 12(b)(6) motions, the district court stated, without prior notice to the parties, "Because the Court has considered matters outside of the pleadings, the Court will treat the Motion to Dismiss as a Motion for Summary Judgment under Rule 56." 855 F. Supp. at 812. Apparently the court's facial analysis of the ordinance relied to some extent on the exhibits which Balitmore filed with its motion to dismiss, and the court's as-applied analysis involved consideration of the submissions Anheuser-Busch offered in support of its motion for a preliminary injunction. The exhibits which Baltimore filed in support of its motion to dismiss consisted of a copy of Ordinance 288, a transcript of the hearings before the City Council, and four studies that the City Council considered as support for the ordinance. In support of their motions for a preliminary injunction, Anheuser-Busch and Penn Advertising submitted, among other things, the Brewing Industry Advertising Code, sample billboard advertisements, and studies which refute a correlation between alcoholic beverage advertising and underage drinking.

The principal challenge to Ordinance 288, advanced under the last two prongs of *Central Hudson*, consists of the contention that the ordinance (1) does not directly advance the stated governmental purpose and (2) is not narrowly tailored to accomplish that purpose. These prongs focus on the fit between Baltimore's statutory objective and the means it selected to achieve that objective. On this facial challenge, the City bears the burden not of

establishing that at every coordinate the regulation advances a governmental purpose and does no more, but rather that it had an objectively reasonable belief that the means which it selected constituted a reasonable "fit" with the regulation's purpose.

If *Central Hudson*'s test required a perfect fit, then Anheuser-Busch would only have to demonstrate some application of the statute inconsistent with the statute's purpose to render it unconstitutional for all purposes. Moreover, if the test required a perfect fit, Anheuser-Busch would certainly be entitled to complete discovery in order to identify all of the statute's possible applications. However, in response to a facial challenge to a regulation of commercial speech, the burden falls on the government to justify its legislative action, but it does not demand that the government canvass every conceivable situation in which some member of the public may be affected atypically by the statute. And the court's inquiry is limited to consideration of the ordinance on its face against the background of the government's objective and the prospect of the ordinance's general effect. If it appears to the court that the legislative body could reasonably have believed, based on data, studies, history, or common sense, that the legislation would directly advance a substantial governmental interest, the government's burden of justifying it is met. *See, e.g., Florida Bar v. Went For It, Inc.*, 63 U.S.L.W. 4644 (June 21, 1995). As the Supreme Court recently observed in *Florida Bar*:

> [W]e have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and "simple common sense."

Id. at 4647 (citations omitted). *Cf. Edenfield v. Fane*, 113 S. Ct. 1792 (1993) (pointing to facts relevant to consideration of *as-applied* challenge to commercial speech

regulation). In *Florida Bar*, the Court relied principally on a study conducted by the Florida bar on the effects of lawyer advertising to conclude that the prohibition against lawyer solicitation within 30 days of an accident directly and materially advanced the state's substantial interest of preserving the integrity of the legal profession. Thus, the government's burden of justifying its legislative enactment against a facial challenge may be carried by pointing to the enactment itself and its legislative history. These are "legislative facts," the substance of which cannot be trumped by the fact finding apparatus of a single court. *See Dunagin v. City of Oxford, Miss.*, 718 F.2d 738, 748-49 n.8 (5th Cir. 1983) (en banc), *cert. denied*, 467 U.S. 1259 (1984). While a party challenging an ordinance can point to other factors not considered by the legislature to demonstrate that the legislature acted irrationally, it cannot subject legislative findings themselves to judicial review under a clearly erroneous standard or otherwise. To do so would ignore the structural separation between legislative bodies and courts and would improperly subordinate one branch to the other. The court's role in reviewing the constitutionality of a legislative enactment is more fundamental; it is limited to addressing whether the legislative enactment conflicts with the Constitution. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

By force of the same reasoning, if a plaintiff challenges a legislative enactment *as applied* to an actual circumstance, then the court is given the task of finding the facts defining that circumstance and determining how the circumstance is impacted by the legislative enactment. *See Edenfield*, 113 S. Ct. at 1800-01.

In this case, the district court properly looked to the legislative history of Ordinance 288 to determine that Baltimore had met its burden under *Central Hudson*. Having found the burden met, the court was not required on a facial challenge to look further with a more specific

inquiry into the ordinance's impact on Anheuser-Busch and Penn Advertising, nor did it. It was unnecessary for the court to have concluded that, because it looked beyond the pleadings to the transcript and four studies constituting the legislative history, it had to consider the case under Rule 56. For purposes of Rule 12(b)(6), the legislative history of an ordinance is not a matter beyond the pleadings but is an adjunct to the ordinance which may be considered by the court as a matter of law. *See generally* 5A Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure* § 1357 (1990) (in deciding Rule 12(b)(6) motions, courts may consider matters of public record, items appearing in the record of the case, as well as exhibits attached to the complaint).

Thus, on the facial challenge to Ordinance 288, we will review the district court's decision, insofar as it considered only the ordinance and its legislative history, as a ruling under Federal Rule of Civil Procedure 12(b)(6), and we review that ruling *de novo*.

III

Traditionally, commercial speech was thought to be an aspect of a free market economy, providing information necessary to enable informed market decisions to be made. While commercial speech was subject to governmental regulation, such regulation was resisted by the same forces that favor open and competitive markets. Such speech was not, however, thought to be protected by the First Amendment. *See, e.g., Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942). Beginning in 1975 with the Supreme Court's decision in *Bigelow v. Virginia*, 421 U.S. 809 (1975), and in 1976 with its decision in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), a "measure" of First Amendment protection was afforded commercial speech in respect to its informational function. But that protection is significantly weaker than that accorded to

the regulation of which is examined under the rubric of strict scrutiny. [sic] *See Metromedia, Inc. v. San Diego*, 453 U.S. 490, 505-07 (1981) (plurality opinion). The Supreme Court has characterized the review of commercial speech regulation as one of intermediate scrutiny, *see generally, Florida Bar*, 63 U.S.L.W. at 4645-46, which is consistent with the "subordinate position [of commercial speech] in the scale of First Amendment values." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

Intermediate scrutiny of commercial speech regulation is conducted under the four-pronged scheme set forth in *Central Hudson*. Because the basis for affording protection to commercial speech pertains to its informational function, in order to be entitled to *any* First Amendment protection, the speech must (1) concern lawful activity and not be misleading. *Central Hudson*, 447 U.S. at 563. If the commercial speech meets that threshold prong, it may nevertheless be regulated if the government (2) asserts a substantial interest in support of its regulation; (3) demonstrates that the regulation "directly advances the governmental interest asserted"; and (4) demonstrates that the regulation is "narrowly drawn," *i.e.* "not more extensive than is necessary" to serve the governmental interest. *Id.* at 565-66. *See also Florida Bar*, 63 U.S.L.W. at 4646.

The first two prongs of *Central Hudson* are not disputed in this case. First, the purchase and consumption of alcoholic beverages are generally lawful, and no party claims that Balitmore's ordinance targets misleading advertising. And second, it is conceded that Baltimore City has a substantial interest in promoting "the welfare and temperance of [its] minors," the interest which it seeks to advance through Ordinance 288. The dispute in this case centers on the third and fourth prongs of *Central Hudson*—whether Ordinance 288 "directly advances" Baltimore City's interest in reducing underage drinking and whether the ordinance is not more extensive than

necessary to serve that interest, i.e. whether it is "narrowly drawn." The inquiry required under these two prongs amounts to consideration of the "fit" between the City's ends and the means chosen to accomplish them. *See Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341 (1986); *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2705 (1993).

The inquiry under *Central Hudson*'s third prong—whether the regulation directly advances the stated interest—does not involve as strict a nexus as that inherent in the traditional tort concept of causation. Rather, the inquiry seeks to elicit whether it was reasonable for the legislative body to conclude that its goal would be advanced in some material respect by the regulation. In *Edge*, where the federal regulation under consideration prohibited the broadcasting of lottery advertisements from facilities in North Carolina (in support of that state's anti-gambling policy), the Edge Broadcasting Company contended that the regulation did not advance the governmental interest at stake by sufficiently direct means. The company demonstrated that even though its broadcasting facility was located on the North Carolina side of the Virginia/North Carolina border, over 90% of its listeners were located in Virginia, where gambling was not illegal. It also noted that the federal regulation did not prohibit a Virginia-based broadcasting company from directing its signal to North Carolina listeners and advertising the Virginia lottery. The company argued, therefore, that the regulation did not directly advance the stated governmental interest of supporting North Carolina's anti-gambling policy. Rejecting the company's argument, the Supreme Court applied a standard that validated the legislature's commonsense judgment that its interests would be advanced by the regulation:

> Congress plainly made the commonsense judgment that each North Carolina station would have an

> audience in that State, even if its signal reached elsewhere and that enforcing the statutory restriction would insulate each station's listeners from lottery ads and hence advance the governmental purpose of supporting North Carolina's laws against gambling.

113 S. Ct. at 2704. As the result of applying this standard the Court concluded, "We have no doubt that the statutes directly advanced the governmental interest at stake in this case. . . . [T]his would plainly be the case even if, as applied to Edge, there were only marginal advancement of that interest." *Id.* at 2704.

Similarly, in *Posadas* the Court observed that it was reasonable for the Puerto Rico legislature to conclude that its interest in reducing its residents' demand for casino gambling would be advanced by placing limitations on casino advertising. *See* 478 U.S. at 341-42.

Again in *Metromedia,* the Court summarized this approach to the third prong of *Central Hudson* by noting that the reviewing court may be satisfied where the legislative judgment is "not unreasonable." 453 U.S. at 509. The Court applied that principle in upholding a ban on any billboard that constituted a distraction and therefore a hazard to traffic safety, even in the face of a claim that the record was "inadequate to show any connection between billboards and traffic safety." *Id.* at 508.

In each case where the Supreme Court affirmed the legislative judgment as reasonable, a logical correlation existed between the legislative objective and the means selected to achieve that objective. Thus in *Edge,* even though only 7.8% of Edge Broadcasting's listening public lived in North Carolina and even though that small population would still be subject to Virginia-based lottery advertisements, the Court concluded that North Carolina's anti-gambling policy would be advanced by prohibiting all lottery advertising by North Carolina-based facilities. *See* 113 S. Ct. at 2704. In *Posadas,* Puerto Rico's regulation prohibiting casinos from "advertis[ing]

or otherwise offer[ing] their facilities to the public of Puerto Rico" was likewise found to advance Puerto Rico's interest in reducing its residents' demand for casino gambling. *Id.* at 341. Adding to the obviousness of that logic, the Supreme Court noted that "the fact that appellant has chosen to litigate this case all the way to this Court indicates that appellant shares the legislature's view." *Id.* at 342 (citing the statement from *Central Hudson*, "There is an immediate connection between advertising and demand for electricity [the advertised product]. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales." 447 U.S. at 569).

In line with these precedents, we find that it was reasonable for the Baltimore City Council to have concluded that Ordinance 288's regulation of the outdoor advertising of alcoholic beverages directly and materially advances Baltimore's interest in promoting the welfare and temperance of minors. The City Council found that outdoor advertising is a unique and distinct medium which subjects the public to involuntary and unavoidable solicitation, and that children, simply by walking to school or playing in their neighborhood, are exposed daily to this advertising. The City Council pointed to its legislative finding that the majority of research studies show a definite correlation between alcoholic beverage advertising and underage drinking, while recognizing that not all studies have reached the same conclusion. There is a logical nexus between the City's objective and the means it selected for achieving that objective, and it is not necessary, in satisfying *Central Hudson*'s third prong, to prove conclusively that the correlation in fact exists, or that the steps undertaken will solve the problem. If that were required, communities could never initiate even minor steps to address their problems, for they could never be assured of the success of their efforts. The proper standard for approval must involve an assessment of the reasonableness of the legislature's belief that the means it

selected will advance its ends. Under that approach, we conclude that Baltimore has met its burden of satisfying the third prong of *Central Hudson*.

Each circuit that has considered the regulation of alcoholic beverage advertising has likewise concluded that the regulation of advertising is reasonably aimed at reducing demand. In *Dunagin*, the Fifth Circuit stated:

> We simply do not believe that the liquor industry spends a billion dollars a year on advertising solely to acquire an added market share at the expense of competitors. Whether we characterize our disposition as following the judicial notice approach taken in *Central Hudson Gas*, or following the "accumulated common-sense judgment" approach taken in *Metromedia*, we hold that sufficient reason exists to believe that advertising and consumption are linked to justify the ban, whether or not "concrete scientific evidence" exists to that effect.

718 F.2d at 750. Similarly, in *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490 (10th Cir. 1983), *rev'd on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984), the Tenth Circuit upheld a prohibition against advertising alcoholic beverages, stating:

> [W]e hold, as a matter of law, that prohibitions against the advertising of alcoholic beverages are reasonably related to reducing the sale and consumption of those beverages and their attendant problems. The entire economy of the industries that bring these challenges is based on the belief that advertising increases sales.

Id. at 501. We now join these courts in holding that restricting the outdoor advertising of alcoholic beverages directly and materially advances the campaign against underage drinking.[5]

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[5] The rationale for the more general restriction prohibiting the advertising of alcoholic beverages, upheld in *Dunagin* and *Crisp*,

Turning to the fourth prong of the *Central Hudson* scheme, we must determine whether the government has demonstrated that its regulation of commercial speech "is not more extensive than is necessary" to serve the stated governmental interest. 447 U.S. at 556. In other words, the means selected to regulate speech must be narrowly tailored to serve a substantial state interest. *See Florida Bar*, 63 U.S.L.W. at 4646; *Board of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, 478 (1989). In assessing whether a regulation is narrowly tailored to serve the state's interest under an intermediate scrutiny framework, the Supreme Court has held that the fit between the regulation and the state's interest need not be perfect, but need only be reasonable. *See Fox*, 492 U.S. at 480. Summarizing the fourth prong of *Central Hudson*, the Court in *Fox* stated:

> What our decisions require is a "fit" between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable: that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.

490 U.S. at 469 (citations and internal quotations omitted). Thus, if a regulation goes only "marginally

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may, however, be insufficient to support a general prohibition against *price advertising* of alcoholic beverages, even though such a restriction was upheld in *44 Liquormart, Inc. v. Rhode Island*, 39 F.3d 5 (1st Cir. 1994), *cert. granted*, 115 S. Ct. 1821 (1995). *Cf. Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995) (finding unconstitutional a labeling ban on the disclosure of alcohol content to combat "strength wars").

beyond what would adequately have served the governmental interest," the regulation will not be invalidated; only when a regulation is "substantially excessive, disregarding far less restrictive and more precise means" will the regulation be invalidated under this prong of *Central Hudson, Fox,* 492 U.S. at 479 (citations and internal quotations omitted). And when there is no "far less restrictive and more precise means" available, the Court has accepted a broad ban of commercial advertising on the grounds that it was "perhaps the only effective approach." *Metromedia,* 453 U.S. at 508.

Satisfaction of the fourth prong of the *Central Hudson* test presents the closest question in this case. It is readily acknowledged that limitations on outdoor advertising of alcoholic beverages designed to protect minors also reduce the opportunities for adults to receive advertised information. And adults, who constitute a majority of the population, are not the object of the government's legislation. But it also appears that no less restrictive means may be available to advance the government's interest.

Anheuser-Busch argues that Baltimore could just as effectively advance its goal of promoting the welfare and temperance of minors by increasing enforcement of existing laws prohibiting sales to, and possession of alcoholic beverages by, minors, or by implementing and encouraging educational programs on the dangers of alcohol. These approaches might indeed prove beneficial in reducing underage drinking, but they do not provide an alternative to the approach selected by the City of curbing the enticement to consume alcoholic beverages. As the Supreme Court observed, quoting the Fifth Circuit in *Dunagin*:

> "We do not believe that a less restrictive time, place and manner restriction, such as a disclaimer warning of the dangers of alcohol, would be effective. The state's concern is not that the public is unaware of

> the dangers of alcohol. . . . The concern instead is that advertising will unduly promote alcohol consumption despite known dangers."

Posadas, 478 U.S. at 344 (quoting *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738, 751 (5th Cir. 1983) (en banc), *cert. denied*, 467 U.S. 1259 (1984)).

If there were some less restrictive means of screening outdoor advertising from minors, or of reducing the area of billboard regulation in a manner that would have it focus more efficiently on reaching minors, the City would have to consider those alternatives. But it is not an acceptable response to the approach taken by the City of limiting advertising exposure to say that the City must abandon altogether an approach that directly advances its goal. In the face of a problem as significant as that which the *City* seeks to address, the City must be given some reasonable latitude. *See Posadas*, 478 U.S. at 346-47; *Metromedia*, 453 U.S. at 509; *Ohralik*, 436 U.S. at 455-56. Similar problems did not defeat the legislature's efforts in *Posadas* (where a ban that went substantially beyond the targeted population was upheld); in *Edge* (where a ban that was intended to apply to only 7.8% of the regulated company's listening public was upheld); or in *Metromedia* (where a ban on all billboards containing commercial advertising was upheld, even though some signs might not create a traffic hazard).

The problem of underage drinking is a most serious one that contributes significantly to a variety of social problems. Baltimore was faced with statistics showing that fully one-half of all deaths of minors were alcohol-related, and 40 to 50% of juveniles who drowned or had driving accidents had consumed alcohol immediately prior to the incident. The City Council found that alcohol is overwhelmingly and consistently the most widely used "drug" at all adolescent age levels. It pointed to data which showed that over half of all twelfth graders, 40% of tenth graders, and over a quarter of eighth graders reported that they consumed alcohol within the past 30

days. Widespread underage drinking was also found to be a major factor in crime. One-third of all juvenile males arrested said they had consumed alcohol within the previous 72 hours, and nearly 40% of all youths in adult correctional facilities reported drinking alcohol before committing their crime.

While it was readily recognized that regulating outdoor advertising would not wholly cure these problems, the regulation was one of the means recommended by the Governor's Prevention Commission, and it was responsive to numerous studies which link alcohol advertising and underage drinking. Through outdoor advertising, children are involuntarily and unavoidably confronted daily with the advertised message. *See Packer Corp. v. Utah*, 285 U.S. 105, 110 (1931) (billboards are "seen without the exercise of choice or volition," and viewers have the message "thrust upon them by all the arts and devices that skill can produce"). The City argues that the only means to address this problem is to ban such advertising in locations where children generally walk and play. Such a ban still permits adults to receive advertising messages and information from signs in commercial areas of the City and through the numerous other media to which adults are constantly exposed.[6]

Although no ordinance of this kind could be so perfectly tailored as to all and only those areas to which children are daily exposed, Baltimore's efforts to tailor the ordinance by exempting commercial and industrial zones from its effort renders it not more extensive than is necessary to serve the governmental interest under con-

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[6] It is noteworthy that for similar reasons the FCC has prohibited cigarette advertising on television and other electronic media. *See* Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1331 et seq. (upheld in *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971), *summarily aff'd sub nom. National Assoc. of Broadcasters v. Kleindienst*, 405 U.S. 1000 (1972)). Yet parents have more control over children's exposure to television than they have over children's exposure to outdoor advertising.

sideration. Accordingly, we find that Baltimore's Ordinance 288 limiting the location of outdoor billboards advertising alcoholic beverages in the City of Baltimore meets *Central Hudson*'s fourth prong.

In summary, Baltimore City's regulation of statutory outdoor "advertising that advertises alcoholic beverages" in certain locations directly and materially advances a substantial governmental interest in promoting the welfare and temperance of minors who are involuntarily and unavoidably exposed to such advertisements. While the means selected of limiting the location of such outdoor advertising is not a perfect "fit" with the governmental objective, it nevertheless falls well within the range tolerated by the First Amendment for the regulation of commercial speech.

IV

In addition to their facial challenge of Ordinance 288, Anheuser-Busch and Penn Advertising contend that "as applied" the ordinance will impermissibly restrict *noncommercial* speech. They argue that the prohibition of outdoor "advertising that advertises alcoholic beverages" would prohibit their noncommercial public service messages which, they maintain, address issues of public interest. On "at least seven" of its billboards in Baltimore City, Anheuser-Busch has devoted a portion of its advertising display space to public service messages, such as "Let's stop underage drinking before it starts," and "Take a friend home for the holidays—friends know when to say when." These messages also include the corporate logo for Anheuser-Busch or a reference to "Budweiser."

There are no allegations that Baltimore considers these signs to fall under the ordinance as "advertising that advertises alcoholic beverages." Indeed, Anheuser-Busch's complaint was filed before the ordinance was to take effect, and as a result, the enforcement of the ordinance has been stayed. Furthermore, the City has indicated that it does not intend to enforce the ordinance against noncommercial speech.

In addressing this argument, the district court observed that whether the public service messages actually constitute noncommercial speech is arguable. The court assumed, without deciding, that the ordinance would not apply to legitimate public service messages, but was unwilling to "render an advisory opinion solely to distinguish between legitimate [public service messages] and true advertisements." 855 F. Supp. at 821. The question of whether speech both advertising a product and providing a public service message constitutes commercial speech is not well settled and may rest strictly on factual findings.

It is settled that commercial speech is speech which does "no more than propose a commercial transaction." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66 (1983) (citations and internal quotations omitted). But in *Bolger* the Court held that multi-page flyers published by a contraceptive manufacturing company to publicize the availability and desirability of contraceptives constituted commercial speech "notwithstanding the fact that they contain[ed] discussions of important public issues such as venereal disease and family planning." *Id.* at 67-68 (footnote omitted). The Court explained, "We have made clear that advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech." *Id.* at 68 (quoting *Central Hudson*, 447 U.S. at 563 n.5).

In this case, Ordinance 288 is directed only at commercial billboards advertising the sale of alcoholic beverages and does not facially regulate public service messages. The question of whether a particular billboard falls within the ordinance's proscription is, on the record before us, a hypothetical one. The City has not threatened to enforce its ordinance against such public service messages and has indicated that it does not intend to do so. Accordingly, we conclude that such an as-applied review of

the ordinance must await an actual or threatened enforcement of the ordinance against a particular advertisement.

For the reasons stated, we affirm the judgment of the district court, upholding Baltimore City Ordinance 288 against a facial constitutional challenge under the First and Fourteenth Amendments.

AFFIRMED

APPENDIX B

[Filed Mar. 28, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Actions Nos. HAR 94-117
HAR 94-145

ANHEUSER-BUSCH, INC. and
PENN ADVERTISING OF BALTIMORE, INC.,
Plaintiffs,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE CITY, *et al.*,
Defendants.

MEMORANDUM OPINION

Plaintiffs Anheuser-Busch, Inc. ("Anheuser-Busch") and Penn Advertising of Baltimore, Inc. ("Penn Advertising") have each brought suit for declaratory and injunctive relief against defendants Mayor and City Council of Baltimore City (the municipal corporation), Kurt L. Schmoke (and his successors as the Mayor of Baltimore City), the City Council of Balimore City, and David Tanner (and his successors as General Superintendent of Zoning Administration and Enforcement), (hereinafter collectively referred to as "the City"). Anheuser-Busch and Penn Advertising challenge Article 30, Section 10.0-1H and Article 30, Section 11.0-7 of the Baltimore City Code, as promulgated by Bill No. 626 (hereinafter collectively referred to as "the Advertising Ban" or "the Ordinance"), as violating the First Amendment to the Constitution of the United States and Article 40 of the Declaration of Rights of the Maryland Constitution. The

Court consolidated the two separate actions on the record in open court in light of their common questions of law and fact. Fed. R. Civ. P. 42(a).

Presently before the Court is a Motion for Preliminary Injunction brought by Anheuser-Busch and Penn Advertising, and a Motion to Dismiss submitted by the City. Because the Court has considered matters outside of the pleadings, the Court will treat the Motion to Dismiss as a Motion for Summary Judgment under Rule 56, Fed. R. Civ. P. 12(b). Having reviewed the parties' memoranda and exhibits, and heard oral argument on the motions, this Court holds that the Ordinance does not violate the First Amendment or Article 40 for the reasons set forth in this memorandum opinion.

FACTS

On May 27, 1993, the Maryland legislature amended Section 222 of the Alcoholic Beverage Statute ("the Maryland Statute") to delegate to the Mayor and City Council of Baltimore the authority to adopt an ordinance restricting outdoor advertisements of alcoholic beverages in Baltimore City if the Mayor and City Council determine the ordinance is "necessary for the promotion of the welfare and temperance of minors." Md. Alco. Bev. Code Ann. §§ 222 and 222(c) (1993). The Maryland Statute exempts from regulation neon or other electric signs in the windows of premises licensed to sell alcohol, signs on MTA vehicles and taxicabs, signs on commercial vehicles used for transporting alcoholic beverages, signs at Memorial Stadium and any property owned, leased or operated by the Maryland Stadium Authority, and signs on property next to interstate highways. Md. Alco. Bev. Code Ann. § 222(c)(2).

Pursuant to its authority under the Maryland Statute, the City enacted the Ordinance on January 6, 1994, which bans, with certain exceptions, the display or ad-

vertisement of alcoholic beverages on billboards in publicly visible locations. The Ordinance contains a lengthy Preamble in which the City describes the problem of underage drinking in the City and asserts that such regulation is necessary to promote the welfare and temperance of minors exposed to such advertisements. The City Council enacted the Ordinance after holding a public hearing on the issue on November 17, 1993, at which private citizens, public officials, experts on advertising, legal scholars, and representatives of Anheuser-Busch and Penn Advertising testified.

Prior to the date the Ordinance took effect, Anheuser-Busch and Penn Advertising brought suit alleging that the Ordinance is unconstitutional.

DISCUSSION [1]

Summary judgment will be granted when no genuine dispute of material fact exists and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). In considering the City's motion, the Court views the underlying facts and all reasonable inferences drawn therefrom in the light most favorable to the parties opposing summary judgment. *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

While the First Amendment [2] guards against unwarranted infringements on commercial speech, it is a well

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[1] Because this Court is prepared to rule on whether the Ordinance violates the First Amendment, the Motion for a Preliminary Injunction is moot. Therefore, this memorandum opinion will focus on the Motion to Dismiss.

[2] The limits on governmental restrictions of speech contained in Article 40 of the Maryland Declaration of Rights are identical to those set forth in the First Amendment. *Freedman v. State*, 233 Md. 498, 197 A.2d 232 (1964), *rev'd on other grounds*, 380 U.S. 51 (1965). Therefore, although this memorandum opinion focuses on the First Amendment challenge, the holding of this Court applies equally to Article 40.

settled principle that "commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression." *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 456 (1978).

The Supreme Court in *Central Hudson* set forth the test for assessing the constitutionality of restrictions on commercial speech:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 566 (1980).

In this case, the parties concur that the advertising at issue is not unlawful or misleading, and that the City's interest in promoting the welfare and temperance of minors is substantial, thereby satisfying the first and second prongs of the *Central Hudson* test. The parties dispute at length whether the Ordinance complies with the third and fourth prongs of the test.[3]

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[3] The City contends that as an exercise of the State's plenary power to regulate the sale of alcohol pursuant to the Twenty-first Amendment, the Ordinance is valid if rationally related to a legitimate government interest. Alternatively, the City asserts that the Ordinance passes the more stringent test for restrictions on commercial speech enunciated in *Central Hudson*, 447 U.S. 557. Because the Ordinance complies with the *Central Hudson* test, an examination of the interplay between the Twenty-first Amendment and restrictions on commercial speech is unnecessary.

Direct Advancement

In *Edenfield v. Fane*, 113 S.Ct. 1792 (1993), the Supreme Court revisited the *Central Hudson* test for commercial speech and concluded that to withstand a First Amendment challenge, the state must demonstrate that "its restriction serves a substantial state interest and is designed in a reasonable way to accomplish that end." *Id.* at 1799. The Supreme Court cautioned that mere assertion that a regulation directly advances an asserted interest is insufficient to justify it. Under the *Central Hudson* test, "[t]his burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree." *Id.* at 1800.

In *Edenfield*, a Certified Public Accountant ("CPA") challenged a Florida ban on in-person solicitation by CPAs, promulgated by the Florida Board of Accountancy, as a violation of his rights under the First and Fourteenth Amendments. In striking down the prohibition, the Supreme Court recognized the substantial governmental interest in protecting consumers from fraud or overreaching by CPAs and in maintaining CPA independence in performing their professional duties. However, the Court held that the Florida Board had failed to demonstrate that the ban against solicitation "advance[d] its asserted interests in any direct and material way." *Id.* at 1800.

In invalidating the restriction, the Supreme Court focused on the Board's failure to present any studies, anecdotal evidence, or individual conduct to support its contention that the ban was necessary to prevent the alleged harm that personal solicitation by CPAs created. The only evidence that the Board presented to support the need for its regulation was an affidavit by a former Chairman of the Florida Board that concluded that the solicita-

tion ban was necessary. In evaluating the Board's proffered evidence, however, the Supreme Court discounted the affidavit, which "contain[ed] nothing more than a series of conclusory statements that add little if anything to the Board's original statement of its justifications." *Id.* at 1800-01. The Court also reviewed a report on CPA solicitation and literature on the accounting profession, which contradicted the Board's concern. *Id.* at 1801.

The City maintains that *Edenfield* does not modify the deference that this Court should afford the legislature under *Central Hudson* when evaluating restrictions on commercial speech. In repeated litigation over the constitutionality of ordinances that restrict the placement of billboards, the Supreme Court has deferred to a legislative judgment that a link exists between billboards and traffic safety. In *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490 (1981), for example, the Supreme Court upheld San Diego's ban on off-site billboard advertising under the *Central Hudson* test. Although the record failed to establish a connection between billboards and traffic safety, the Court nonetheless upheld the restriction, reasoning: "We likewise hesitate to disagree with the accumulated, commonsense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety. There is nothing here to suggest that these judgments are unreasonable." *Id.* at 509 (footnote omitted).

The City urges this Court to follow the Fifth and Tenth Circuits in deferring to a legislative judgment that a link exists between alcohol advertising and consumption when evaluating the Ordinance under *Central Hudson.* Prior to *Edenfield,* the Fifth Circuit upheld a Mississippi law banning liquor advertising by local, in-state media despite the absence of concrete data to support such a link in *Dunagin v. Oxford,* 718 F.2d 738 (5th Cir. 1983), *cert. den.,* 467 U.S. 1259 (1984): "Whether we

characterize our disposition as following the judicial notice approach taken in *Central Hudson Gas*, or following the 'accumulated, common-sense judgment' approach taken in *Metromedia*, we hold that sufficient reason exists to believe that advertising and consumption are linked to justify the ban, whether or not 'concrete scientific evidence' exists to that effect." *Id.* at 750.

In *Oklahoma Telecasters Association v. Crisp*, 699 F.2d 490 (10th Cir. 1983), *rev'd on other grounds sub nom., Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984), the Tenth Circuit likewise deferred to a legislative judgment linking alcohol advertising and consumption in upholding a prohibition against the broadcasting of advertisements for alcoholic beverages. The Tenth Circuit relied on the plurality's language in *Metromedia* and a lesser standard of review under the Twenty-first Amendment[4] to hold "as a matter of law, that prohibitions against the advertising of alcoholic beverages are reasonably related to reducing the sale and consumption of those beverages and their attendant problems." *Id.* at 501.

Anheuser-Busch and Penn Advertising contend that the City's continued reliance on the earlier cases of *Dunagin* and *Crisp*, in light of the Supreme Court's recent decision in *Edenfield*, are misplaced. Instructed by the Supreme Court that absolute deference to a legislative judgment is no longer appropriate when regulating commercial speech, Anheuser-Busch and Penn Advertising argue that the City must demonstrate that the Advertising Ban will reduce underage drinking in a direct and material way in order to withstand constitutional scrutiny. According to Anheuser-Busch, "*Edenfield* requires the judiciary to undertake a thorough and searching evaluation of a legislature's self-serving or presumed conclusion that its proposed restriction on commercial speech will directly advance a substantial government interest. 113 S.Ct. at 1800." Memorandum of Law in Support of Motion for

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[4] *See* note 3, *supra*.

Preliminary Injunction, pp. 22-23. Anheuser-Busch and Penn Advertising contend that *Edenfield* requires this Court to conduct a hearing and allow the parties to develop a more extensive record before the Court may rule on the constitutionality of the Ordinance.

This Court, however, is unable to find any language in *Edenfield* that specifies the precise level of scrutiny with which this Court must review the Ordinance. *Edenfield* requires only that the government "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." 113 S.Ct. at 1800. The opinion does not contain any reference to an evidentiary hearing. This Court has reviewed the numerous exhibits submitted by all parties, which are part of the record in this case. At the motions hearing, the parties were unable to persuasively articulate the benefit that an evidentiary hearing would bring to resolution of this case. Therefore, in light of the extensive record that the parties have already established in this case, this Court concludes that an evidentiary hearing is not necessary.

Shortly after the Supreme Court issued its decision in *Edenfield*, it affirmed the role of judicial deference to legislative judgments in the area of commerical speech. In *U.S. v. Edge Broadcasting Co.*, 113 S. Ct. 2696 (1993), Edge, the owner and operator of a North Carolina radio station, challenged a federal statute that prohibited radio broadcast of lottery advertising by licensees located in nonlottery states as a violation of the First Amendment. Congress has enacted the federal statute to assist States in controlling this form of gambling. Since Edge broadcasted from near the Virginia-North Carolina border, 90% of his listeners were in Virginia, which sponsors a lottery. Edge's remaining listeners were in North Caro"na, a nonlottery state. Seeking to broadcast Virginia lottery advertisements, Edge brought suit alleging that the statute, as applied to him, violated the First Amendment.

In assessing the restriction under *Central Hudson*, the Supreme Court found that the exclusion of gambling advertisements from 11% of the radio listening time in the area directly served North Carolina's interest in upholding its ban on gambling. *Id.* at 2706. The Court rejected the broadcaster's argument that the regulation's failure to shield North Carolina residents from all advertising and information on lotteries rendered it ineffective. The Court acknowledged the propriety of a legislative judgment that advertising increases consumption, and the judicial deference that such a judgment warrants:

> Within the bounds of the general protection provided by the Constitution to commercial speech, we allow room for legislative judgments. Here, as in *Posadas de Puerto Rico*, the Government obviously legislated on the premise that the advertising of gambling serves to increase the demand for the advertised product. Congress clearly was entitled to determine that broadcast of promotional advertising of lotteries undermines North Carolina's policy against gambling, even if the North Carolina audience is not wholly unaware of the lottery's existence. Congress has, for example, altogether banned the broadcast advertising of cigarettes, even though it could hardly have believed that this regulation would keep the public wholly ignorant of the availability of cigarettes.

Id. at 2707 (citations omitted).

The handful of lower courts that have considered the impact of the recent Supreme Court decisions involving commercial speech on *Central Hudson* have recognized a legislative judgment that advertising increases consumption. In *Cal-Almond, Inc. v. U.S. Department of Agriculture*, 1993 Westlaw 526908 (9th Cir. December 22, 1993), almond handlers challenged the collection of assessments by the California Almond Board to conduct general almond advertising. In discussing the validity of the assessment-funded almond promotion program, the

Ninth Circuit adhered to the judicial recognition that a link exists between advertising and consumption. Despite *Edenfield*'s general instruction to evaluate the government's interests and the harms it seeks to avoid, the Ninth Circuit noted: "[t]he Supreme Court assumes as a matter of law that advertising increases consumption of the product or service being advertised . . . Therefore, we may reasonably assume that the Board's promotional efforts have some positive effect on almond demand." *Id.* at *8 (citations omitted).

In *New York State Association of Realtors v. Shaffer*, 833 F. Supp. 165 (E.D.N.Y. 1993), an association of real estate brokers sought a declaratory judgment that a statute authorizing the Secretary of State to issue "nonsolicitation" orders, which prevented real estate brokers from directly soliciting clients, was unconstitutional. The asserted purpose of the nonsolicitation orders was to prevent "blockbusting," where individuals prey on the fears of property owners in racially transitional areas, thereby producing panic selling and instability in the community. The Eastern District of New York granted summary judgment to defendants, holding that the statute and attendant regulations did not violate the First Amendment.

In determining whether the regulation directly advanced the government's asserted interest, the District Court reviewed the *Edenfield* opinion for guidance. The District Court focused on the Supreme Court's search for any studies, anecdotal evidence, or individual conduct in *Edenfield* to demonstrate the alleged harm that accountant solicitation created. *Id.* at 179. Although New York failed to present extensive studies to show the existence of the harm it sought to regulate, the District Court held in *Shaffer* that generalized anecdotal evidence of the evil that blockbusting presented satisfied the third prong of *Central Hudson*: "In reviewing the totality of the evidence presented in this case, the Court finds that there is sufficient evidence of blockbusting. Accordingly, the Court finds that Section 442-h furthers the governmental

interest of combatting the invidious practice of blockbusting." *Id. Shaffer* thus differed from *Edenfield* in that the court found evidence of the harm that blockbusting created in the former, while no comparable evidence of the alleged harm flowing from CPA solicitation existed in the latter. Like defendants in *Shaffer*, the City has presented extensive evidence of the harm that underage drinking presents in Baltimore City.

In support of its contention that *Edenfield* requires a more searching inquiry than previously had been required, Anheuser-Busch and Penn Advertising cite two recent cases that invalidated advertising restrictions on alcohol after a hearing. In *Adolph Coors Co. v. Bentsen*, 2 F.3d 355 (10th Cir. 1993), the Tenth Circuit held that a regulation prohibiting statements of alcohol content on malt beverage labels violated the First Amendment. The government contended that the purpose of the regulation was to prevent strength wars among competing manufacturers. In invalidating the regulation, the court noted: "[t]he critical question is whether the evidence shows the required relationship between the labeling prohibition that Coors is challenging and the threat of strength wars." *Id.* at 358.

In *Coors*, the government relied primarily on anecdotal evidence that manufacturers were already competing and advertising on the basis of alcohol strength. However, the government failed to provide any evidence to show that factual statements of alcohol content contributed to these strength wars, rather than the more descriptive terms used to advertise alcohol strength. Also, the government presented no evidence to indicate that strength wars existed where alcohol content labeling was required. The Tenth Circuit thus concluded that "the government has offered no evidence to indicate that the appearance of factual statements of alcohol content on malt beverage labels would lead to strength wars or that their continued prohibition helps to prevent strength wars. Instead, it has

offered only inferential arguments that are based on mere speculation and conjecture and fails to show that the prohibition advances the Government's interest in a direct and material way." *Id.* at 359.

In *44 Liquor Mart v. Racine*, 829 F. Supp. 543 (D.R.I. 1993), the Rhode Island District Court struck down a state statute prohibiting off-premises price advertisements of alcoholic beverages because the state had failed to establish that the ban on price advertisements directly advanced its interest in reducing alcohol consumption. After evaluating the expert testimony and research results, the court concluded that the ban on price advertisements had no significant impact on alcohol consumption in the state.

The District Court in *44 Liquor Mart* repeatedly distinguished between a restriction on price advertising and a general ban on alcohol advertising, the Ordinance at issue in this case. Although the court referenced the Supreme Court's recognition in *Edge* that an immediate connection exists between advertising and demand in lottery gambling, it noted that "the regulations at issue in this case make no attempt to reduce the amount of alcohol advertising, but merely proscribe the dissemination of truthful price information." 829 F. Supp. at 553 n.10. The court twice declined to rule on the constitutionality of a total or partial ban on alcohol advertising. *Id.* at 549 n.6 and 553 n.10.

Coors and *44 Liquor Mart* thus differ from the instant case with respect to the type of link between the regulation and the asserted governmental interest. A link between statements of alcohol content and strength wars, or between price advertisements and alcohol consumption is, at best, tenuous. Although advertisements of alcohol content or price may influence the particular brand that a consumer chooses, they are unlikely to persuade one who does not otherwise consume alcoholic beverages to indulge. In contrast, a link between general advertising and

overall consumption is more immediately apparent. *See, e.g., Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 342 (1986) ("We think [that] the legislature's belief [that advertising of casino gambling would serve to increase the demand for the product advertised] is a reasonable one"); *Central Hudson*, 447 U.S. at 569 ("[t]here is an immediate connection between advertising and demand for electricity.")

The Supreme Court and the Ninth Circuit have affirmed the propriety of deferring to a legislative judgment that a causal connection exists between advertisements and alcohol consumption even after *Edenfield*. *See Edge*, 113 S.Ct. at 2707; *Cal-Almond*, 1993 Westlaw 526908 at *8. Moreover, the District Court in *44 Liquor Mart* repeatedly distinguished its case from those where a link between advertising and consumption was self-evident, the exact scenario present in this case:

> Unlike a number of cases in the commercial speech area, the link between alcohol price advertising and increased per-capita consumption is not self-evident. *See, e.g., Posadas*, 478 U.S. at 341-42, 106 S.Ct. at 2976-77 (link between ban on gambling advertising and level of gambling self-evident); *Central Hudson*, 447 U.S. at 569, 100 S.Ct. at 2353 (link between advertising ban and sales self-evident); *Dunagin v. Oxford*, 718 F.2d at 747-49 & n.8 (link between overall advertising and increased alcohol use deemed self-evident).

829 F. Supp. at 554.

In fact, the City has exceeded the required level of proof under *Central Hudson* by submitting further evidence in support of the Ordinance. Despite the judicially recognized "self-evident" proposition that advertising increases consumption, and the deference that a legislative judgment to that effect warrants, the City has submitted various studies that establish a connection between al-

cohol advertising and adolescents' attiudes toward alcohol, and between alcohol advertising and consumption. The City Council, an elected legislative body, also conducted a public hearing on the Ordinance prior to its enactment at which several private citizens, public officials, experts in advertising, attorneys, and representatives of Anheuser-Busch and Penn Advertising spoke.

In response, Anheuser-Busch and Penn Advertising have submitted various studies that refute the existence of a connection between alcohol advertising and consumption among adults or adolescents, and critiques of the studies that show an affirmative link between advertising and consumption. Anheuser-Busch maintains that the purpose of its advertising is not to increase overall consumption, but merely to increase its market share of a constant pool of those who have already decided to consume alcohol. Castellano Aff. ¶ 20. As the Fifth Circuit aptly stated in *Dunagin*, however:

> It is beond our ability to understand why huge sums of money would be devoted to the promotion of sales of liquor without expected results, or continue without realized results. No doubt competitors want to retain and expand their share of the market, but what businessperson stops short with competitive comparisons? It is total sales, profits, that pay the advertiser; and dollars go into advertising only if they produce sales. Money talks: it talks to the young and the old about what counts in the marketplace of our society.

718 F.2d at 749.

In light of the Supreme Court's continued deference to a legislative judgment that advertising increases consumption, even after *Edenfield*, this Court finds that the Ordinance directly advances the City's asserted interest in promoting the welfare and temperance of minors.

Narrowly Tailored

In *Board of Trustees v. Fox*, 492 U.S. 469 (1989), the Supreme Court explained that the fourth prong in the *Central Hudson* test requires only that the regulation be reasonable to withstand constitutional scrutiny:

> What our decisions require is a "fit" between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interests served; that employs not necessarily the least restrictive means but, . . . a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.

Id. at 480 (internal quotations and citations omitted).

In declining to impose a "least restrictive means" requirement, the Supreme Court acknowledged in *Fox* "the difficulty of establishing with precision that point at which restrictions become more extensive than their objective requires, and provide the Legislative and Executive Branches needed leeway in a field (commercial speech) 'traditionally subject to governmental regulation,'" *Id.* at 481 (quoting Ohralik v. Ohio State Bar Assn., 436 U.S. at 455-56).[5] An intermediate level of scrutiny thus recognizes the latitude that decisionmakers require to address widespread social problems.

In *Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505 (1993), the Supreme Court invalidated a city ordinance because no reasonable fit existed between the regulation and the asserted interest. Motivated by its concern for safety and aesthetics, Cincinnati used a pre-

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[5] The party that seeks to uphold a restriction on commercial speech must affirmatively show that a reasonable fit exists between the regulation and the asserted interest. *Fox*, 492 U.S. at 480.

existing ordinance, which prohibited distribution of "commercial handbills" on public property, to remove offensive newsracks containing commercial handbills. In concluding that the ordinance violated the First Amendment, the Court held that the city had failed to establish the necessary "reasonable fit" between its legitimate interest in safety and aesthetics and the means that it had chosen to pursue that interest. Removal of 62 newsracks containing commercial speech pursuant to the ordinance ignored 1,500 to 2,000 similar newsracks that contained noncommercial speech, even though the remaining newsracks created identical aesthetic and safety problems. *Id.* at 1510. Therefore, the Court concluded that the distinction that Cincinnati had drawn between newsracks dispensing commercial handbills and those dispensing noncommercial speech had no bearing on its asserted interests. *Id.* at 1516.

The Court reiterated its view in *Discovery Network* that "reasonable fit" involves a more searching inquiry than rational basis review, but one less rigorous than "least restrictive means." Consideration of alternatives is a factor in determining "reasonable fit": "A regulation need not be absolutely the least severe that will achieve the desired end, but if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." *Id.* at 1510 n.13 (internal quotations and citation omitted).

Anheuser-Busch and Penn Advertising argue that the Ordinance fails to satisfy the fourth prong of the *Central Hudson* test because alternative, less burdensome means exist to reduce underage drinking, such as increased enforcement of existing laws against underage drinking and heightened campaigns to educate adolescents about alcohol consumption.

The mere suggestion of alternatives, however, does not conclusively establish that the City's chosen means are not

narrowly tailored; a reasonable fit is all that is necessary: "A judge need not agree with the decisionmaker as to the most appropriate method for promoting a governmental interest, as long as there is a reasonable fit between the restriction and the interest served, the manner of regulation is left to the decisionmaker." *Destination Ventures v. F.C.C.*, 1994 Westlaw 49486, *7 (D. Or. January 20, 1994) (citations omitted). In other words, although consideration of alternatives is an element of "reasonable fit," it is not dispositive.

Anheuser-Busch and Penn Advertising further assert that the Ordinance is not narrowly tailored because its numerous exceptions make the net reduction of the number of alcohol advertisements to which children are exposed minute. The Supreme Court, however, has rejected the need for a regulation to address every source of harm in order to withstand constitutional scrutiny. In *Edge*, the Court stated:

> Nor do we require that the Government make progress on every front before it can make progress on any front. If there is an immediate connection between advertising and demand, and the federal regulation decreases advertising, it stands to reason that the policy of decreasing demand for gambling is correspondingly advanced. Accordingly, the Government may be said to advance its purpose by substantially reducing lottery advertising, even where it is not wholly eradicated.

Edge, 113 S.Ct. at 2707.

Anheuser-Busch and Penn Advertising also contend that the Ordinance is invalid because the City may not deprive adults of their right to receive information flowing from commercial advertisements of alcohol in order to protect minors. They cite *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73-75 (1983), in which the Supreme Court invalidated a federal statute that prohibited the

mailing of unsolicited advertisements for contraceptives, to support their proposition.

In *Bolger*, however, the Supreme Court recognized that the governmental interest in protecting children may in some instances justify special treatment. *Id.* at 74. Citing *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), which upheld a restriction on broadcasting in order to protect children, the Court emphasized the narrowness of that holding based on the uniquely pervasive and accessible nature of the broadcasting medium. *Id.* In distinguishing *Bolger* from *Pacifica*, the Court found that "[t]he receipt of mail is far less intrusive and uncontrollable" than broadcasting. *Id.* The Court noted that parents already exercise substantial control over mail once it enters their mailboxes and are entitled under a federal statute to limit their receipt of sexually provocative material. Therefore, an additional regulation prohibiting unsolicited advertisements on contraceptives was unnecessary. *Id.* at 73.

As in the broadcasting context, parents are similarly unable to control their children's exposure to outdoor billboard advertisements of alcoholic beverages. The Supreme Court recognized in *Packer Corporation v. Utah*, 285 U.S. 105 (1932), the unique nature of outdoor advertisements:

> Advertisements of this sort are constantly before the eyes of observers on the streets . . . to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off, but not so the billboard . . . .

Id. at 110 (internal quotations omitted).

For the foregoing reasons, this Court finds that a reasonable fit exists between the Ordinance and the City's aserted interests, thereby satisfying the fourth prong of *Central Hudson.*

Public Service Announcements

Anheuser-Busch and Penn Advertising challenge the Ordinance, as applied, as unconstitutional due to its overbreadth because it impermissibly restricts their noncommercial speech in violation of the First Amendment. After baldly asserting that their Public Service Announcements ("PSAs") constitute noncommercial speech, they contend that the Ordinance must pass strict scrutiny as applied to the PSAs.

This Court notes initially that whether PSAs actually constitute noncommercial speech is arguable. Although manufacturers and advertisers purport to sponsor PSAs for the public welfare, the success of PSAs in promoting their sponsors is undeniable. By containing identifying logos or trade names, PSAs enhance the goodwill of a company, thereby advancing its selling potential. Were companies solely motivated to contribute to the public welfare, the PSAs that they sponsor would be anonymous.

However, for the purposes of this action, this Court assumes without deciding that legitimate PSAs are fully protected speech, to which the Ordinance does not apply, based on the City's concession that PSAs do not constitute commercial speech. City's Reply Memorandum in support of its Motion to Dismiss, p. 5. To the extent that manufacturers and advertisers attempt to mask advertisements as PSAs, however, those advertisements are subject to the Ordinance's restriction. Therefore, the "as applied" challenge to the Ordinance is misplaced.

Anheuser-Busch and Penn Advertising assert that their challenge to the Ordinance, as applied to their PSAs, is currently ripe for consideration. They allege that to force

manufacturers and advertisers to wait until the City prosecutes them before they may raise the defense that the Ordinance is unconstitutional as applied will not adequately vindicate their First Amendment rights because the threat of prosecution may "chill" protected speech almost as severely as the actual imposition of sanctions. *See Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979); *Dombrowski v. Pfister*, 380 U.S. 479, 485-87 (1965). As stated above, however, this Court assumes without deciding that the Ordinance does not apply to legitimate PSAs. This Court will not render an advisory opinion solely to distinguish between legitimate PSAs and true advertisements.

Penn Advertising further alleges that the Advertising Ban is unconstitutional because it is vague and delegates standardless discretion to those who are to enforce the Ordinance. As a matter of due process, a law is facially void if it is so vague that persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). The test of whether a statute is vague is an objective one. *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 501 (1982).

Penn Advertising professes its ignorance of the meaning of the phrase, "No person may place any sign . . . or any other form of advertising that advertises alcoholic beverages in publicly visible locations." Penn Advertising contends that the Court must determine initially which of its signs constitute "advertisement," and thus are subject to the Ordinance, and which are exempt PSAs.

As stated above, this Court assumes without deciding that some legitimate PSAs exist that fall outside the scope of the Ordinance. Advertising that attempts to bypass the Ordinance by hiding under the cloak of a PSA, however, is fully subject to the ban. A sign that prominently displays a manufacturer's logo and product, for example,

is clearly advertising subject to the Ordinance despite the nominal attempt to characterize it as a PSA. For a company that deals specifically with advertising to now allege that it does not know what the term "advertising" means is, in this Court's view, disingenuous. Penn Advertising, if anyone, is well versed in the subtleties of the advertising industry, and knows when it attempts to predominantly advance sales rather than enhance the public welfare. By the plain meaning of the terms, then, the scope of the restriction is clear; it covers all "advertising" of alcoholic beverages in publicly visible locations. Since a person of ordinary intelligence reasonably could be expected to determine what signs constitute advertisement, the language of the Ordinance is not impermissibly vague.

Penn Advertising also argues that the Ordinance unconstitutionally favors certain categories of noncommercial speech over other noncommercial speech, and certain categories of commercial speech over certain noncommercial speech. According to Penn Advertising, the exceptions contained in the Ordinance that permit advertising to occur in certain specified locations while banning PSAs from manufacturers of alcoholic beverages in nonexempt publicly visible locations, and that allow generic alcoholic beverage advertisements make the Ordinance unconstitutionally discriminatory. In advancing this argument, Penn Advertising relies on *Cincinnati v. Discovery Network*, 113 S.Ct. 1505.

Unlike the situation in *Discovery Network*, however, the distinction between permitted and prohibited advertisements in this Ordinance rests on the effect that different mediums have on adolescents. While adolescents may see an advertisement for alcoholic beverages at Camden Yards while watching a baseball game, their exposure to that advertisement ends when the game ends. An advertisement on an MTA vehicle or taxicab likewise presents only a fleeting image of an alcoholic beverage. In contrast, a billboard is a constant fixture in a neighborhood. It looms over children every day while they walk to

school, and every time they play in their neighborhood, thus forming an inescapable part of their daily life. The Supreme Court aptly characterized the unique nature of outdoor billboards: "Advertisements of this sort are constantly before the eyes of observers on the streets . . . to be seen without the exercise of choice or volition on their part." *Packer*, 285 U.S. at 110 (internal quotations omitted). Billboard advertisements thus form a constant impetus to consume the product being advertised, the precise goal of the advertisement.

Furthermore, despite protestations to the contrary, the reality is that billboard advertisements for alcoholic beverages focus on depressed inner-city neighborhoods. Billboards are conspicuously absent from more affluent communities. They present a stark contrast to adolescents between the lifestyle depicted in the advertisement and the actual neighborhood surrounding them, thereby enhancing the attractiveness of the advertised product. The distinction among various mediums thus appropriately accounts for the difference in their treatment.

Penn Advertising's final argument is that the City exceeded the authority that the Maryland statute granted it to enact the Ordinance because the City failed to show that the restriction is necessary to promote the welfare and temperance of minors. In effect, Penn Advertising seeks to bypass any deference that the Court may afford the legislature pursuant to the Twenty-first Amendment by raising this statutory argument as a separate Count, in which the Twenty-first Amendment does not apply. Because the Court has upheld the Ordinance under *Central Hudson*, however, without reference to the effect of the Twenty-first Amendment on the City's authority to regulate commercial speech, this argument in effect simply involves an analysis of whether the regulation "directly advances" the City's asserted interest and whether a reasonable fit exists between the regulation and the governmental interest.

Conclusion

For the reasons stated above, the Court holds that Article 30, Section 10.0-1*H* and Article 30, Section 11.0-7 of the Baltimore City Code, as promulgated by Bill No. 626, does not violate the First Amendment to the Constitution or Article 40 of the Maryland Declaration of Rights.

In accordance with this memorandum opinion, it will be so ordered.

/s/ John R. Hargrove

JOHN R. HARGROVE
Senior United States
District Judge

Date 3/28/94

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action Nos. HAR 94-117
HAR 94-145

ANHEUSER-BUSCH, INC. and
PENN ADVERTISING OF BALTIMORE, INC.,
Plaintiffs,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE CITY, *et al.*,
Defendants.

ORDER

For the reasons set forth in the attached Memorandum Opinion, this Court holds that Article 30, Section 10.0-1H and Article 30, Section 11.0-7 of the Baltimore City Code, as promulgated by Bill No. 626, does not violate the First Amendment to the Constitution or Article 40 of the Maryland Declaration of Rights.

Therefore, IT IS this 28th day of March, 1994, by the United States District Court for the District of Maryland, hereby ORDERED:

1. That Defendants' Motion to Dismiss BE, and the same hereby IS, GRANTED.

2. That the Clerk of the Court CLOSE this case.

3. That the Clerk of the Court mail copies of this Order to all parties of record.

/s/ John R. Hargrove
JOHN R. HARGROVE
Senior United States
District Judge

APPENDIX C

Baltimore Ordinance No. 288 (City Council Bill 626):

AN ORDINANCE Concerning

ZONING CODE—ADVERTISING
ALCOHOLIC BEVERAGES

FOR the purpose of restricting the placement of outdoor advertisements for alcoholic beverages; and providing a penalty.

BY adding

Article 30—Zoning
Chapter 10—Sign Regulations
Section 10.0-1h
Baltimore City Code (1983 Replacement Volume, as amended)

By repealing and reordaining with amendments

Article 30—Zoning
Chapter 11—Administration and Enforcement
Section 11.0-7
Baltimore City Code (1983 Replacement Volume, as amended)

Preamble

WHEREAS, Sections 400-403A of Article 27 of the Maryland Code make it unlawful for any person under the age of 21 years to obtain, possess or control any alcoholic beverages in the State of Maryland, and section 118 of Article 2B of the Maryland Code prohibits the sale or furnishing of any alcoholic beverages to a person under 21 years of age by any licensee authorized to sell such products in the State of Maryland; and

WHEREAS, Alcoholic beverages are the second most heavily advertised products in America (after cigarettes), and the alcoholic beverages industry spends more than

$100 million annually for outdoor advertising of its products; and

WHEREAS, Outdoor advertisements are a unique and distinguishable medium of advertising which subjects the general public to involuntary and unavoidable forms of solicitation, as the Supreme Court recognized in *Packer Corporation v. Utah*, 285 U.S. 105 (1932) by citing with approval the following excerpt from the opinion of the Utah Supreme Court:

> "Advertisements of this sort are constantly before the eyes of observers on the streets . . . to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off, but not so the billboard . . . . These distinctions clearly place this kind of advertisement in a position to be classified so that regulations or prohibitions may be imposed upon all within the class. This is impossible with respect to newspapers and magazines."

WHEREAS, The Supreme Court and other courts have recognized the positive relationship between advertising and consumption as regards a variety of goods and services, such as electricity, *see Central Hudson Gas & Elec. v. Pub. Serv. Comm'n*, 447 U.S. 557, 569 (1980) ("There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales."); gambling, *see Posades de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341-42 (1986) ("The Puerto Rico Legislature obviously believed, when it enacted the advertising re-

strictions at issue here, that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised. We think the legislature's belief is a reasonable one . . . ."[)]; cigarettes, *see Capital Broadcasting Co. v. Mitchell*, 33 F. Supp. 582, 586 (D.D.C. 1971) (three-judge court) (noting "close relationship between cigarette commercials broadcast on the electronic media and their potential influence on young people."), *aff'd per curiam*, 405 U.S. 1000 (1972); and alcohol, *see Dunagin v. City of Oxford*, 718 F.2d 738, 747-51 (1983) (extensively reviewing evidence on connection between liquor advertising and consumption and rejecting inter-brand competition argument), *cert. den.*, 104 S.Ct. 3533 (1984); and

WHEREAS, In addition to judicial recognition of the general link between advertising and consumption, a report by the Prevention Committee of Governor William Donald Schaefer's Drug and Alcohol Abuse Commission on "The Impact of Alcohol Advertising and the Use of Alcohol in Television Programs and Films on Underage Drinking" (January, 1993) concluded:

> Research consistently showed that children's attitudes favorable to alcohol are significantly related to their exposure to alcohol advertisements.
>
> Specific alcoholic beverage advertising practices such as use of cartoon characters and animals (*e.g.*, "Spuds McKenzie") that are especially appealing to children and youth, using rock stars and athletes as spokespersons, and associating drinking with sports and other activities that have a great appeal to youth such as race car driving, rock climbing, water sports, etc. greatly contribute to attitudes favorable to alcohol among youth.
>
> Children are exposed to billboards advertising alcohol on a regular basis simply by walking to school or playing in their neighborhood, and there is no

practical means of parental monitoring or limiting of exposure to these public advertisements.

The "overwhelming majority" of research studies showed a definite correlation between alcohol advertising and underage drinking.

Glamorous "lifestyle" alcoholic beverage advertisements have a "profound influence" on young people's attitudes about alcohol.

Research shows that when children's exposure to alcohol advertising increases they:

perceive drinking as more attractive, acceptable and rewarding;

view drinkers more positively (i.e., more friendly, relaxed, fun-loving, happy, sophisticated, etc.);

are more likely to see beer drinking as "cool" and "macho";

are more likely to believe that drinking is a way to relax and deal with stress;

are more likely to agree that it is okay for teenagers to drink;

are more likely to name alcohol than water as an appropriate beverage for adults; and

have increased expectations to drink in the future.

A variety of studies indicate that alcohol is involved in at least one-half of all the major causes of death among youth: motor vehicle crashes, suicides, homicides, drowning and other accidents. Alcohol-related accidents are now the leading cause of death among young people; and

WHEREAS, The 1992 Maryland Adolescent Drug Survey conducted by the Maryland Department of Education found that:

11.8% of 6th graders, 26.2% of 8th graders, 40.8% of 10th graders, and 52.9% of 12th graders reported use of alcohol within the past 30 days. Of these children, 1.9% of 6th graders, 6.3% of 8th graders, 19.9% of 10th graders and 32.4% of 12th graders reported binge drinking (5 or more servings) within the past 30 days.

Over 25% of eighth graders report being in a car driven by someone under the influence of alcohol; that figure exceeds 60% by the 12th grade.

Nearly 40% of students reported that they themselves have driven within one hour of consuming one to four alcoholic beverages on at least one occasion within the past year.

Alcohol is overwhelmingly and consistently the most widely used drug at all adolescent age levels.

Alcohol is a "gateway" drug among Maryland students, *i.e.*, a substance often used by adolescents as a first drug which appears to "open the door" for use of harder drugs at a later date; and

WHEREAS, Accordingly [sic] to 1992 reports by then U.S. Surgeon General, Dr. Antonia Novello ("Youth and Alcohol: Dangerous and Deadly Consequences") and then U.S. Inspector General, Richard Kusserow ("Youth and Alcohol: Drinking and Crime"):

about one-third of all juvenile males arrested said they had used alcohol in the previous 72 hours.

nearly 40% of youths in adult correctional facilities reported drinking before committing the crime.

18% of high school females and 39% of high school males say that "it's okay to force sex if the girl is drunk."

a "striking association" exists between alcohol use and using firearms to commit suicide by 10-to-19 years olds.

40% to 50% of young males who drowned had consumed alcohol prior to drowning.

40% to 50% of youths injured diving had consumed alcohol prior to diving.

Among high school seniors, twice as many frequent binge drinkers skipped school (55% versus 25%), and nearly five times as many seniors who binged frequently damaged school property (36% versus 8%); and

WHEREAS, In Senate Bill 808, signed by Governor William Donald Schaefer on May 27, 1993, the Maryland General Assembly specifically authorized Baltimore City to enact an ordinance restricting the placement of certain advertisements for alcoholic beverages in order to promote the welfare and temperance of minors; and

WHEREAS, An ordinance restricting the placement of advertisements for alcoholic beverages in publicly visible locations within Baltimore City is necessary for the promotion of the welfare and temperance of minors exposed to such advertisements; and

WHEREAS, The restrictions contained in the following ordinance will not unduly burden legitimate business activities or persons licensed by the State of Maryland to sell alcoholic beverages on a retail basis; and

WHEREAS, In order to protect legitimate business activities and to narrowly focus its efforts on those advertisements which most directly affect minors where they live, attend school, attend church and engage in recreational activities, the Baltimore City Council has determined to exercise less than the complete authority conferred on it by Senate Bill 808 (Chapter 637, 1993 Acts of the General Assembly) and has determined specifically not to restrict advertisements of alcoholic beverages in certain designated business and industrial zones hereinafter identified, with reasonable and appropriate setbacks from adjoining zones; now, therefore,

Section 1. BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF BALTIMORE, That Section(s) of the Baltimore City Code (1983 Replacement Volume, as Amended) be added, repealed, or amended, to read as follows:

ARTICLE 30—ZONING

Chapter 10—Sign Regulations

10.0-1 General Requirements.

H. ALCOHOLIC BEVERAGE ADVERTISEMENTS. NO PERSON MAY PLACE ANY SIGN, POSTER, PLACARD, DEVICE, GRAPHIC DISPLAY, OR ANY OTHER FORM OF ADVERTISING THAT ADVERTISES ALCOHOLIC BEVERAGES IN PUBLICLY VISIBLE LOCATIONS. IN THIS SECTION "PUBLICLY VISIBLE LOCATIONS" INCLUDES OUTDOOR BILLBOARDS, SIDES OF BUILDING, AND FREESTANDING SIGNBOARDS. THIS SECTION SHALL NOT APPLY TO:

1. THE PLACEMENT OF SIGNS, INCLUDING ADVERTISEMENTS: (I) INSIDE "LICENSED PREMISES" AS DEFINED IN ARTICLE 2B OF THE MARYLAND CODE; (II) ON COMMERCIAL VEHICLES USED FOR TRANSPORTING ALCOHOLIC BEVERAGES; OR (III) IN CONJUNCTION WITH A 1-DAY ALCOHOLIC BEVERAGES LICENSE OR A TEMPORARY LICENSE GRANTED BY THE BOARD OF LICENSE COMMISSIONERS;

2. ANY SIGN THAT CONTAINS THE NAME OR SLOGAN OF THE "LICENSED PREMISES" THAT HAS BEEN PLACED FOR THE PURPOSE OF IDENTIFYING THE "LICENSED PREMISES";

3. EXCEPT FOR BILLBOARDS AND FREESTANDING SIGNBOARDS, ANY SIGN

FOR WHICH ZONING BOARD APPROVAL OR A MINOR PRIVILEGE PERMIT IS REQUIRED;

4. ANY SIGN THAT CONTAINS A GENERIC DESCRIPTION OF BEER, WINE, LIQUOR, OR SPIRITS, OR ANY OTHER GENERIC DESCRIPTION OF ALCOHOLIC BEVERAGES;
5. ANY NEON OR ELECTRICALLY CHARGED SIGN ON "LICENSED PREMISES" THAT IS PROVIDED AS PART OF A PROMOTION OF A PARTICULAR BRAND OF ALCOHOLIC BEVERAGE;
6. ANY SIGN ON AN MTA VEHICLE OR A TAXICAB;
7. ANY SIGN ON PROPERTY OWNED, LEASED OR OPERATED BY THE MARYLAND STADIUM AUTHORITY;
8. ANY SIGN AT MEMORIAL STADIUM;
9. ANY SIGN AT A FACILITY THAT OPERATES IN ACCORDANCE WITH A LICENSE ISSUED UNDER § 11-304 OF THE BUSINESS REGULATION ARTICLE OF THE MARYLAND CODE;
10. ANY SIGN ON PROPERTY ADJACENT TO AN INTERSTATE HIGHWAY; OR
11. ANY SIGN LOCATED: (I) IN A B-4 ZONE, (II) IN A M-3 ZONE MORE THAN 1,000 FEET FROM THE BOUNDARY OF ANY OTHER ZONE WHICH IS NOT A B-4 OR M-3 ZONE, (III) IN A M-3 ZONE MORE THAN 500 FEET FROM THE BOUNDARY OF ANY OTHER ZONE WHICH IS NOT A B-4 OR

M-3 ZONE PROVIDED SUCH SIGN FACES AWAY FROM ANY SUCH OTHER ADJOINING ZONE.

Chapter 11—Administration and Enforcement

11.0-7 Penalties for violation.

Any person who violates, disobeys, omits, neglects, refuses to comply with, or resists the enforcement of any of the provisions of this ordinance shall be guilty of a misdemeanor and, upon conviction in any court of competent jurisdiction, shall be fined not less than 25 nor more than 500 dollars; ANY PERSON FOUND GUILTY OF VIOLATING A PROVISION OF SECTION 10.0-1h MAY BE FINED UP TO 1,000 DOLLARS. Every such person shall be deemed guilty of a separate offense for every day such violation shall continue after notification thereof.

SEC. 2. AND BE IT FURTHER ORDAINED, That this ordinance may only be applied to or interpreted to have an effect on any contract executed after the effective date of this ordinance and to any renewal term of a preexisting contract beginning after the effective date of this ordinance.

SEC. 3. AND BE IT FURTHER ENACTED, That this ordinance shall take effect on the 30th day after the date of its enactment.

APPENDIX D

Baltimore Ordinance No. 328 (City Council Bill 709):

AN ORDINANCE concerning

ZONING CODE—SIGNS

SECTION 1. BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF BALTIMORE, That Section(s) of the Baltimore City Code (1983 Replacement Volume, as amended) be added, repealed, or amended to read as follows:

ARTICLE 30—ZONING

Chapter 10—Sign Regulations.

10.0-3. Signs in Business and Industrial Districts.

a. General Provisions.

7. At least 50% of the window area of each side of a building shall be free of signage, when such window area is associated with commercial use.

b. The following types of signs, subject to the limitations prescribed for them, shall be permitted for uses authorized as principal or conditional uses in Business and Industrial Districts:

7. Special standards for business signs on store fronts.

The owner or operator of a business premises, other than a gasoline service station, shall designate to the Zoning Administrator consolidated area(s) on which all signs for the premises shall be located. The consolidated area(s) shall not exceed the square footage permitted for all signs, minus the total area used by any identification or name plate sign. Permit application shall be made on a one-time basis for each area, and shall include descriptions or drawings of the consolidated display area(s), or shall comply with specific criteria established by the Zon-

ing Administrator. Failure to maintain the consolidated areas in conformity with approved descriptions and/or drawings shall cause the permit to terminate.

Chapter 13—Rules and Definitions

13.0-2 Definitions.

74. Sign: any writing (including letter, word, or numeral), pictorial representation (including illustration or graphic), emblem (including symbol or trademark), flag (including banner or pennant), device, or any other figure of similar character which: (a) is a structure or any part thereof, or is attached to, painted on, or in any other manner represented on a building, window (this includes anything affixed to the interior and displayed in the space within twelve inches of the window), or other structure; and (b) is used to announce, direct attention, or advertise; and (c) is visible from outside a building. A sign shall not, however, include any writing, representation, or any figure of similar character within a building.

* * * *

APPENDIX E

Baltimore Ordinance No. 329 (City Council Bill 711):

AN ORDINANCE concerning

ZONING CODE—SIGNS

SECTION 1. BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF BALTIMORE, That Section(s) of the Baltimore City Code (1983 Replacement Volume, as amended) be added, repealed, or amended, to read as follows:

ARTICLE 30—ZONING

Chapter 10—Sign Regulations

10.0-3 Signs in Business and Industrial Districts

a. General provisions.

7. At least 50% for the window area of each side of a building shall be free of signage, when such window area is associated with commercial use.

b. The following types of signs, subject to the limitations prescribed for them, shall be permitted for uses authorized as principal or conditional uses in Business and Industrial Districts:

7. Special standards for business signs on store fronts.

The owner or operator of a business premises, other than a gasoline service station, shall designate to the Zoning Administrator consolidated areas on which all signs for the premises shall be located. The consolidated areas shall not exceed the square footage permitted for all signs, minus the total area used by any identification or name plate sign. Permit application shall be made on a one-time basis for each area, and shall include descriptions or drawings of the consolidated display area(s), or shall

comply with specific criteria established by the Zoning Administrator. Failure to maintain the consolidated areas in conformity with approved descriptions or drawings shall cause the permit to terminate.

8. Any sign on the side of a "licensed premises", as defined in Article 2B of the Annotated Code of Maryland, indicating the brand name and price of an alcoholic beverage product or a cigarette product available for sale within the "licensed premises" when permitted by any provision of this code or any other law or regulation now or hereafter in force.

SEC. 2. AND IT BE FURTHER ORDAINED, That this ordinance shall take effect on the 30th day after the date of its enactment.

APPENDIX F

[Filed Jan. 14, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. ———

ANHEUSER-BUSCH, INC.
One Busch Plaza
St. Louis, Missouri 63118-1852
Plaintiff,

v.

MAYOR AND CITY COUNCIL OF
BALTIMORE CITY
City Hall
100 N. Holliday Street
Baltimore, Maryland 21202

Serve On:

NEIL M. JANEY
City Solicitor
City Hall
100 N. Holliday Street
Baltimore, Maryland 21202

and

KURT L. SCHMOKE
in his official capacity as
Mayor of Baltimore City
City Hall
100 N. Holliday Street
Baltimore, Maryland 21202

Serve On:

NEIL M. JANEY
City Solicitor
City Hall
100 N. Holliday Street
Baltimore, Maryland 21202

and

THE CITY COUNCIL OF
BALTIMORE CITY
City Hall
100 N. Holliday Street
Baltimore, Maryland 21202

Serve On:

NEIL M. JANEY
City Solicitor
City Hall
100 N. Holliday Street
Baltimore, Maryland 21202

and

DAVID TANNER,
in his official capacity as
the General Superintendent of
Zoning Administration and
Enforcement,
417 E. Fayette Street
Baltimore, Maryland 21202

Serve On:

NEIL M. JANEY
City Solicitor
City Hall
100 N. Holliday Street
Baltimore, Maryland 21202

and

J. JOSEPH CURRAN, JR.,
in his official capacity as
Attorney General of the State
of Maryland

Serve On:

J. JOSEPH CURRAN, JR.,
Attorney General of the
State of Maryland
200 Saint Paul Place
Baltimore, Maryland 21202

and

WINFIELD M. KELLY, JR.
Secretary of State
State House
Annapolis, Maryland 21401
Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff Anheuser-Busch, Inc. ("Anheuser-Busch") for its Complaint herein alleges:

NATURE OF THE ACTION

1. This is an action:

(i) pursuant to 28 U.S.C. §§ 2201 and 2202, for a declaratory judgment that Section 222 of the Maryland Alcoholic Beverages Law (the "Maryland Statute") and Section 10.0-1h of the Baltimore Zoning Law (the "Baltimore Ordinance") are unconstitutional, void, unenforceable and of no force and effect under the First and Fourteenth Amendments of the United States Constitution and Article 40 of

the Declaration of Rights of the Maryland Constitution;

(ii) pursuant to 42 U.S.C. § 1983, for a preliminary and permanent injunction enjoining enforcement of the Maryland Statute and the Baltimore Ordinance, or the taking of any action pursuant thereto, by defendants, their agents, servants, employees or anyone acting in concert with them or on their behalf; and

(iii) pursuant to 42 U.S.C. § 1988, for Anheuser-Busch's attorneys' fees for this action.

JURISDICTION AND VENUE

2. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1332 and 1343. The amount in controversy, exclusive of interest and costs, exceeds $50,000.

3. Venue lies in this district pursuant to 28 U.S.C. § 1391(b), as the claims arose, and defendants reside, in this district.

THE PARTIES

4. Anheuser-Busch is a Missouri corporation, having its principal place of business in St. Louis, Missouri. Among other things, Anheuser-Busch is a manufacturer and distributor of alcoholic and non-alcoholic malt beverages.

5. Defendant Kurt L. Schmoke ("Schmoke") is the Mayor of the City of Baltimore ("Baltimore"). Defendant Schmoke is named herein in his official capacity as Mayor.

6. Defendant The City Council of Baltimore City (the "Council") is the elected body of legislators for the City of Baltimore.

7. Schmoke and the Council are purportedly authorized by the Maryland Statute to adopt the Baltimore

Ordinance. The Council passed the Baltimore Ordinance on December 9, 1993 and Schmoke signed it into law on January 6, 1994. With certain exceptions, the Baltimore Ordinance prohibits the advertisement of alcoholic beverages on publicly visible media, including but not limited to, outdoor billboards, sides of buildings and freestanding signboards in most of Baltimore.

8. Defendant David Tanner ("Tanner") is the General Superintendent of Zoning Administration and Enforcement of the City of Baltimore (the "Zoning Administrator") and is authorized and empowered to enforce the Baltimore Ordinance. Defendant Tanner is named herein in his official capacity as Zoning Administrator.

9. Defendant J. Joseph Curran, Jr. ("Curran") is the Attorney General of the State of Maryland (the "Attorney General") and is authorized and empowered to enforce the Maryland Statute. The Maryland Statute purports to enable the City of Baltimore to pass the Baltimore Ordinance. Defendant Curran is named herein in his official capacity as Attorney General.

BACKGROUND

A. *Outdoor Advertising by Anheuser-Busch*

10. Anheuser-Busch regularly sells and distributes several well-known brands of beer to wholesalers within the City of Baltimore. To promote the sale of its brands of beer in Baltimore, Anheuser-Busch advertises its products on television and radio, in print media, and through promotional events and displays. Anheuser-Busch also advertises its products on outdoor billboards and freestanding signboards and other publicly visible media (collectively, "outdoor advertising media"). On information and belief, local retailers also display promotional posters advertising Anheuser-Busch's brands on the sides of their buildings.

11. As a form of advertising, outdoor advertising has special characteristics in that it reaches a broad range of

consumers at a relatively low cost, and allows Anheuser-Busch to communicate with consumers in settings where other advertising media are unavailable. For these reasons, the use of outdoor advertising media is an essential part of Anheuser-Busch's marketing strategy to persuade consumers of beer to purchase the brands of beer manufactured and distributed by Anheuser-Busch.

12. Anheuser-Busch seeks to discourage illegal consumption of alcoholic beverages by minors. In connection with this effort, Anheuser-Busch adheres to the beer industry's self-imposed, voluntary advertising guidelines which are set forth in the Brewing Industry Advertising Code (the "Advertising Code"). The Advertising Code contains specific guidelines designed to ensure that beer advertisements do not target youth. Among other things, the Advertising Code provides that advertisers should not use images or entertainment figures that are intended to appeal primarily to persons under the legal drinking age. A copy of the Advertising Code is attached hereto as Exhibit A.

13. In addition, Anheuser-Busch has developed, and follows, a code that specifically covers its marketing efforts on college campuses (the "College Marketing Code"). The College Marketing Code promotes responsible drinking by those students who are twenty-one or over and choose to drink, and compliance with applicable state law by those students who are under twenty-one. A copy of the College Marketing Code is attached hereto as Exhibit B.

14. Further, Anheuser-Busch has developed or sponsored numerous programs in Baltimore and elsewhere that promote responsible drinking by adults who choose to drink, and discourage consumption of alcoholic beverages by those under the legal drinking age. For example, Anheuser-Busch has developed educational programs that seek to prevent underage drinking by focusing on the

primary factors that influence a minor's decision to drink, namely, parental and peer influence.

15. Prior to the passage of the Baltimore Ordinance, Anheuser-Busch had advertisements for its brands of beer displayed on dozens of billboards in Baltimore. On at least seven of those billboards, Anheuser-Busch devoted a portion of its advertising display space to public service messages designed, among other things, to promote responsible drinking among adults and to discourage underage drinking. Examples of Anheuser-Busch's public service messages are attached hereto as Exhibit C.

16. Prior to the enactment of the Baltimore Ordinance, each of Anheuser-Busch's contracts with the outdoor advertising companies that display Anheuser-Busch's advertisements contained a provision requiring that Anheuser-Busch's billboards comply with all zoning laws, ordinances or regulations of the City of Baltimore and the State of Maryland.

B. *The Maryland Statute*

17. For the past several years, certain Baltimore community groups have lobbied the city government for an ordinance to restrict the permissible location of outdoor advertising media for alcoholic beverages. The city government was unable to pass any such ordinance, however, because it lacked the authority to regulate alcoholic beverages, including the advertisement of alcoholic beverages. The proponents of the restrictions therefore sought the passage of legislation by the State of Maryland that would enable Baltimore to enact restrictions on the use of outdoor advertising media for alcoholic beverage advertisements.

18. On May 27, 1993, the Maryland legislature enacted the Maryland Statute. The Maryland Statute purports to delegate to the Mayor and City Council of Baltimore the power to adopt an ordinance restricting adver-

tisements of alcoholic beverages on outdoor advertising media in Baltimore. The sole purported purpose of the Maryland Statute, as expressed therein, is "the promotion of the welfare and temperance of minors." A copy of the Maryland Statute is annexed hereto as Exhibit D.

19. In relevant part, the Maryland Statute provides:

> (c)(1) The Mayor and City Council of Baltimore may adopt an ordinance restricting the placement of signs, posters, placards, devices, graphic displays, or any other forms of advertising or on the sides of the building of the licensed premises that advertise alcoholic beverages in publicly visible locations if:
>
> (i) The ordinance is necessary for the promotion of the welfare and temperance of minors exposed to advertisements for alcoholic beverages placed in publicly visible locations; and
>
> (ii) The restrictions do not unduly burden legitimate business activities of persons licensed under this article to sell alcoholic beverages on a retail basis.

20. The Maryland Statute defines "publicly visible locations" as including, but not limited to, advertising on billboards, sides of buildings and freestanding signboards.

21. The Maryland Statute mandates that any ordinance passed pursuant thereto exempt certain signs from regulations:

> (c)(2) The ordinance adopted by the Mayor and City Council of Baltimore City may not restrict:
>
> (i) the placement of signs, including advertisements:
>
> 1. Inside licensed premises;
>
> 2. On commercial vehicles used for transporting alcoholic beverages; or

3. In conjunction with a 1-day alcoholic beverages license or a temporary license granted by the board of license commissioners;

(ii) Any sign that contains the name or slogan of the licensed premises that has been placed for the purpose of identifying the licensed premises;

(iii) Except for billboards and freestanding signboards, any sign for which zoning board approval or a minor privilege permit is required;

(iv) Any sign that contains a generic description of beer, wine, liquor, or spirits, or any other generic description of alcoholic beverages;

(v) Any neon or electrically charged sign on licensed premises that is provided as part of a promotion of a particular brand of alcoholic beverage;

(vi) Any sign on an MTA vehicle or a taxicab;

(vii) Any sign on property owned, leased, or operated by the Maryland Stadium Authority;

(viii) Any sign at Memorial Stadium;

(ix) Any sign at a facility that operates in accordance with a license issued under § 11-304 of the business regulation article; or

(x) Any sign on property adjacent to an interstate highway.

22. In conjunction with the Maryland Statute, the legislature amended Article II of the Charter of the City of Baltimore, which contains the police power, to expand the power and authority of the Mayor and City Council of Baltimore City to include the following:

To pass any ordinance, not inconsistent with the provisions of this Charter or the laws of the State, which it may deem proper in the exercise of any of the powers, either express or implied, enumerated

in this Chapter, as well as any ordinance as it may deem proper in maintaining the peace, good government, health and welfare of Baltimore City *and to promote the welfare and temperance of minors exposed to advertisements for alcoholic beverages placed in publicly visible locations.* (New text [in italics].)

C. *The Baltimore Ordinance*

23. After the State passed the Maryland Statute, the Council passed the Baltimore Ordinance which, by amending the City Zoning Ordinance, bans, with certain exceptions, the advertisement of alcoholic beverages on outdoor advertising media in most parts of Baltimore. A copy of the Baltimore Ordinance is attached hereto as Exhibit E.

24. The Baltimore Ordinance contains a lengthy Preamble which sets forth purported legislative findings of the Council on the supposed effects that advertising for alcoholic beverages has on consumption of alcoholic beverages by minors. In fact, there is no proof identified in the Preamble or elsewhere that advertising for alcoholic beverages, including Anheuser-Busch's outdoor advertising, increases or even affects consumption of alcoholic beverages by minors.

25. Among other things, the Baltimore Ordinance states:

> *Alcoholic beverage advertisements.* No person may place any sign, poster, placard, device, graphic display, or any other form of advertising that advertises alcoholic beverages in publicly visible locations. In this section "publicly visible locations" includes outdoor billboards, sides of buildings and freestanding signboards.

26. The Baltimore Ordinance specifically exempts from regulation all the categories of outdoor advertising

of alcoholic beverages that are mandatorily exempted by the Maryland Statute. The Baltimore Ordinance further exempts from regulation the placement of publicly visible alcoholic beverage advertising in certain designated business and industrial zones.

27. Pursuant to section 11.0-7 of the Baltimore Zoning Law, a violation of the Baltimore Ordinance is a misdemeanor punishable by a fine of up to $1,000 a day for every day the violation continues after notification of the violation.

28. Anheuser-Busch intends to continue its long-standing practice of advertising its brands of beer and displaying its public service messages on outdoor advertising media located in Baltimore. The placement of many of these outdoor advertisements will violate the prohibitions of the Baltimore Ordinance.

29. On information and belief, if Anheuser-Busch does the acts described in the preceding paragraph, the Zoning Administrator will charge the persons who place the prohibited outdoor advertising with violations of the Baltimore Ordinance, subjecting them to criminal and civil enforcement proceedings and fines, unless the Maryland Statute and the Baltimore Ordinance are declared unconstitutional and enforcement of the Baltimore Ordinance is enjoined.

30. There is a case of actual controversy between plaintiff and defendants.

D. *Impact of the Maryland Statute and Baltimore Ordinance*

31. The Baltimore Ordinance, as authorized by the Maryland Statute, bans the accurate and non-misleading advertising of beer and other alcoholic beverages on outdoor advertising media in the City of Baltimore, and thereby deprives adult consumers in Baltimore of useful

information about lawful products in the marketplace. Anheuser-Busch's accurate and non-misleading advertising of its products, and related messages to the public such as those discouraging underage drinking and encouraging responsible drinking among adults, are speech protected by the First Amendment of the United States Constitution, and by Article 40 of the Declaration of Rights of the Maryland Constitution.

32. The sole declared purpose of both the Maryland Statute and the Baltimore Ordinance is the promotion of temperance among minors. That purpose, however, will not be directly and materially advanced by restricting minors' exposure to outdoor advertisements for alcoholic beverages.

33. The Maryland Statute and the Baltimore Ordinance will, in fact, undermine their stated purpose by prohibiting advertisers such as Anheuser-Busch from disseminating invaluable public service messages through outdoor advertising media that are expressly designed to discourage underage drinking.

34. The Maryland Statute and Baltimore Ordinance completely bar Anheuser-Busch's ability to address its commercial advertising for its brands of beer and its public service messages concerning, among other things, the responsible consumption of beer to adult consumers. At the same time, there are numerous other means of promoting temperance among minors that would impose no or far fewer restrictions on free speech than do the Maryland Statute and Baltimore Ordinance, such as educational programs and enforcement of existing laws that make it illegal for minors to possess or to be furnished with alcoholic beverages. Accordingly, the Maryland Statute and Baltimore Ordinance are not permissible means for achieving the express legislative goal of each.

FIRST CLAIM FOR RELIEF
(Declaratory Judgment)

35. Anheuser-Busch repeats, realleges and incorporates the allegations set forth in paragraphs 1 through 34 as though fully set forth herein.

36. The Maryland Statute purports to delegate to the Mayor and Council the express authority to pass an ordinance containing content-based restrictions on both the noncommercial and the commercial speech of Anheuser-Busch. The provisions of the Maryland Statute render it impossible for Baltimore to adopt an ordinance that comports with constitutional requirements under the First Amendment of the United States Constitution or under Article 40 of the Declaration of Rights of the Maryland Constitution.

37. The purported delegation of authority by the Maryland Statute provides for a direct restraint on Anheuser-Busch's exercise of free speech in advertising its brands of beer through outdoor advertising media, or in otherwise associating its brands of beer with public service messages on outdoor advertising media in the City of Baltimore.

38. The Maryland Statute's express delegation of authority to restrict lawful noncommercial and commercial speech violates Anheuser-Busch's right to freedom of speech guaranteed by the First Amendment to the United States Constitution, as made applicable to the States by the Fourteenth Amendment, and by Article 40 of the Declaration of Rights of the Maryland Constitution.

39. Similarly, the Baltimore Ordinance provides for a direct restraint on Anheuser-Busch's exercise of free speech in advertising its brands of beer through outdoor advertising media, or in otherwise associating its brands of beer with public service messages on outdoor advertising media in the City of Baltimore.

40. The Baltimore Ordinance's restriction of lawful expression violates Anheuser-Busch's right to freedom of speech guaranteed by the First Amendment to the United States Constitution, as made applicable to the States by the Fourteenth Amendment, and by Article 40 of the Declaration of Rights of the Maryland Constitution.

41. If the Maryland Statute and the Baltimore Ordinance are not declared unconstitutional, Anheuser-Busch will be caused irreparable injury for which there is no adequate remedy at law.

SECOND CLAIM FOR RELIEF
(Injunctive Relief)

42. Anheuser-Busch repeats, realleges and incorporates the allegations set forth in paragraphs 1 through 41 as though fully set forth herein.

43. Enforcement of the Baltimore Ordinance will cause plaintiff irreparable injury for which there is no adequate remedy at law.

44. Anheuser-Busch is entitled to a preliminary and permanent injunction enjoining enforcement of the Baltimore Ordinance, or the taking of any action pursuant thereto, by defendants.

THIRD CLAIM FOR RELIEF
(Attorneys' Fees)

45. Anheuser-Busch repeats, realleges and incorporates the allegations set forth in paragraphs 1 through 44 as though fully set forth herein.

46. Anheuser-Busch is entitled, pursuant to 42 U.S.C. § 1988, to recover reasonable attorneys' fees incurred by it in this action for vindication of its civil rights.

WHEREFORE, plaintiff Anheuser-Busch requests:

a) That this Court declare the Maryland Statute to be an impermissible restriction on speech, on its face or as

applied against plaintiff, in violation of the First Amendment of the United States Constitution, as made applicable to the States by the Fourteenth Amendment, and in violation of Article 40 of the Declaration of Rights of the Maryland Constitution, and thus void, unenforceable and of no force and effect; and

b) That this Court declare the Baltimore Ordinance to be an impermissible restriction on speech, on its face or as applied against plaintiff, in violation of the First Amendment of the United States Constitution, as made applicable to the States by the Fourteenth Amendment, and in violation of Article 40 of the Declaration of Rights of the Maryland Constitution, and thus void, unenforceable and of no force and effect; and

c) That this Court preliminarily and permanently enjoin defendants Mayor and City Council of Baltimore City, Kurt L. Schmoke, and his successors in the Office of Mayor, The City Council of the City of Baltimore, and David Tanner, and his successors in the Office of Zoning Administrator, from enforcing the Baltimore Ordinance, or the taking of any action pursuant thereto, by defendants, their agents, servants, employees or anyone acting in concert with them or on their behalf; and

d) That this Court award Anheuser-Busch reasonable attorneys' fees incurred herein in connection with plaintiff's vindication of its civil rights pursuant to 42 U.S.C. § 1988; and

e) That this Court order such further relief as it may deem just and proper, including the costs of this action.

Dated: Baltimore, Maryland
January 14, 1994

NEUBERGER, QUINN, GIELEN,
RUBIN & GIBBER, P.A.

By: /s/ Thomas M. Wood
THOMAS M. WOOD IV

Commerce Place
One South Street
Baltimore, Maryland 21202
(410) 332-8550

CADWALADER, WICKERSHAM & TAFT

By: /s/ John J. Walsh
JOHN J. WALSH

100 Maiden Lane
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Attorneys for Plaintiff

APPENDIX G

[Filed Jan. 21, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. ———

PENN ADVERTISING OF BALTIMORE, INC.
3001 Remington Ave.
Baltimore, MD 21211

Plaintiff,

v.

THE MAYOR AND CITY COUNCIL
OF THE CITY OF BALTIMORE,
A Municipal Corporation
City Hall
100 N. Holliday Street
Baltimore, MD 21202

Serve On:

NEAL M. JANEY
City Solicitor
100 City Hall
Baltimore, MD 21202

and

J. JOSEPH CURRAN, JR.
Attorney General of the State
of Maryland, in his official capacity

Serve On:

J. JOSEPH CURRAN, JR.
Attorney General of the
State of Maryland
200 Saint Paul Place
Baltimore, MD 21202

and

TYRAS S. ATHEY
Secretary of State for the
State of Maryland
State House
Annapolis, MD 21401
Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Plaintiff, Penn Advertising of Baltimore, Inc. ("Penn Advertising"), sues the Defendants, the Mayor and City Council of the City of Baltimore, Maryland (the "City") and J. Joseph Curran, Jr. ("Curran"), in his official capacity, stating as follows:

GENERAL ALLEGATIONS

1. Jurisdiction is conferred on this Court by 28 U.S.C. § 1331 and §§ 1343(a)(3) and (4).

2. This Complaint is authorized by 42 U.S.C. § 1983.

3. This Court has supplemental jurisdiction over claims brought under State and local law pursuant to 28 U.S.C. § 1367.

4. This Court has jurisdiction to enter a declaratory judgment and injunctive relief under 28 U.S.C. §§ 2201 and 2202.

5. Attorneys' fees are provided for by 42 U.S.C. § 1988.

6. All events and actions, unless otherwise set forth, took place or will take place within the District of Maryland. Therefore, venue lies in this District pursuant to 28 U.S.C. § 1391(b).

7. Plaintiff, Penn Advertising, is a Delaware corporation authorized to do business in Maryland and is doing business in the City of Baltimore and elsewhere in the

State of Maryland with its principal place of business at 3001 Remington Avenue, Baltimore, Maryland 21211.

8. Defendant, City, is a municipal corporation duly organized and existing under the laws of the State of Maryland and is a political subdivision of the State of Maryland.

9. Defendant, J. Joseph Curran, Jr., is the Attorney General of the State of Maryland with the official duty to enforce and defend from constitutional attack, the laws of the State of Maryland. Curran is named herein as a defendant in his official capacity.

10. Penn Advertising is engaged in the business of outdoor advertising in the City of Baltimore and elsewhere in the State of Maryland. Penn Advertising leases land from private property owners, on which land Penn Advertising erects and maintains outdoor advertising sign structures as a medium for communication, and disseminates, and makes its signs available to the public to disseminate, commercial and noncommercial messages on those outdoor advertising sign structures. Among the advertising messages Penn Advertising has disseminated in the past, currently disseminates, and intends to disseminate in the future, are advertising messages concerning alcoholic beverages. All of said advertising messages for particular products concern products that are lawful in the City and the State of Maryland. All of said advertising messages are neither deceptive nor misleading.

11. On or about May 27, 1993, Senate Bill 808 ("SB 808") was enacted by the Maryland General Assembly and went into effect on June 1, 1993. A true and correct copy of SB 808 is attached hereto and is made a part hereof as Exhibit A and is incorporated herein by reference.

12. A portion of Section 1 of SB 808 is codified at Art. 2B, § 222 of the Maryland Code Annotated ("Section 222"). Section 222(a) limits the application of Sec-

tion 222 solely to Baltimore City. Section 222(b) defines "publicly visible locations" as follows: "In this section 'publicly visible locations' include outdoor billboards, sides of buildings, and freestanding signboards." Section 222(c) purports to give the City the authority to adopt an ordinance:

> . . . restricting the placement of signs, posters, placards, devices, graphic displays, or any other forms of advertising or on the sides of the building of the licensed premises that advertise alcoholic beverages in publicly visible locations if:
>
> (i) The ordinance is necessary for the promotion of the welfare and temperance of minors exposed to advertisements for alcoholic beverages placed in publicly visible locations; and
>
> (ii) The restrictions do not unduly burden legitimate business activities of persons licensed under this article to sell alcoholic beverages on a retail basis.

13. Section 222(c)(2) further provides that any ordinance enacted by the City must not restrict certain exempt categories of signs and certain exempt categories of messages pertaining to alcoholic beverages:

> (2) The ordinance adopted by the Mayor and City Council of Baltimore City may not restrict:
>
> (i) The placement of signs, including advertisements:
>
> 1. Inside licensed premises;
>
> 2. On commercial vehicles used for transporting alcoholic beverages; or
>
> 3. In conjunction with a 1-day alcoholic beverages license or a temporary license granted by the Board of Liquor Commissioners;

(ii) Any sign that contains the name or slogan of the licensed premises that has been placed for the purpose of identifying the licensed premises;

(iii) Except for billboards and freestanding signboards, any sign for which zoning board approval or a minor privilege permit is required;

(iv) Any sign that contains a generic description of beer, wine, liquor, or spirits, or any other generic description of alcoholic beverages;

(v) Any neon or electrically charged sign on licensed premises that is provided as part of a promotion for a particular brand of alcoholic beverage;

(vi) Any sign on an MTA vehicle or a taxicab;

(vii) Any sign on property owned, leased, or operated by the Maryland Stadium Authority;

(viii) Any sign at Memorial Stadium;

(ix) Any sign at a facility that operates in accordance with a license issued under § 11-304 of the Business Regulation Article; or

(x) Any sign on property adjacent to an interstate highway.

14. Section 222(d) states that: "A person who violates the provisions of this section is guilty of a misdemeanor and may be fined no more than $1,000."

15. A portion of Section 1 of SB 808 also amended Article II of the Charter of Baltimore City and reads as follows:

Article II—General Powers

The Mayor and City Council of Baltimore shall have full power and authority to exercise all of the powers heretofore or hereafter granted to it by the Constitution of Maryland or by any Public General

or Public Local Laws of the State of Maryland; and in particular, without limitation upon the foregoing, shall have power by ordinance, or such other method as may be provided for in its Charter, subject to the provisions of said Constitution and Public General Laws:

(47) General Welfare.

To pass any ordinance, not inconsistent with the provisions of this Charter or the laws of the State, which it may deem proper in the exercise of any of the powers, either express or implied, enumerated in this Charter, as well as any ordinance as it may deem proper in maintaining the peace, good government, health and welfare of Baltimore City AND TO PROMOTE THE WELFARE AND TEMPERANCE OF MINORS EXPOSED TO ADVERTISEMENTS FOR ALCOHOLIC BEVERAGES PLACED IN PUBLICLY VISIBLE LOCATIONS.

16. On or about January 6, 1994, the City enacted Bill No. 626 ("Bill No. 626"), which is codified at Article 30, Section 10.0-1H and Article 30, Section 11.0-7 of the Baltimore City Code. A true and correct copy of Bill No. 626 is attached hereto as Exhibit B and is incorporated herein by reference.

17. The Preamble of Bill No. 626 sets forth in detail in eleven "Whereas" clauses the asserted facts that the Mayor and City Council of Baltimore relied upon as the basis for enacting Bill No. 626 into law.

18. The Preamble of Bill No. 626 made a number of legislative findings, including without limitation, that:

WHEREAS, In Senate Bill 808, signed by Governor William Donald Schaefer on May 27, 1993, the Maryland General Assembly specifically authorized Baltimore City to enact an ordinance restricting the placement of certain advertisements for alcoholic

beverages in order to pomote the welfare and temperance of minors; and

WHEREAS, An ordinance restricting the placement of advertisements for alcoholic beverages in publicly visible locations within Baltimore City is necessary for the promotion of the welfare and temperance of minors exposed to such advertisements; and

WHEREAS, The restrictions contained in the following ordinance will not unduly burden legitimate business activities of persons licensed by the State of Maryland to sell alcoholic beverages on a retail basis; . . .

19. Section 1 of Bill No. 626 amended the Baltimore City Code (1983 replacement volume, as amended) to add Section 10.0-1H to Article 30, Zoning, Chapter 10, Sign Regulations to read as follows:

ARTICLE 30—ZONING

Chapter 10—Sign Regulations

10.0-1 General Requirements.

H. ALCOHOLIC BEVERAGE ADVERTISEMENTS. NO PERSON MAY PLACE ANY SIGN, POSTER, PLACARD, DEVICE, GRAPHIC DISPLAY, OR ANY OTHER FORM OF ADVERTISING THAT ADVERTISES ALCOHOLIC BEVERAGES IN PUBLICLY VISIBLE LOCATIONS. IN THIS SECTION "PUBLICLY VISIBLE LOCATIONS" INCLUDES OUTDOOR BILLBOARDS, SIDES OF BUILDING, AND FREESTANDING SIGNBOARDS. THIS SECTION SHALL NOT APPLY TO:

1. THE PLACEMENT OF SIGNS, INCLUDING ADVERTISEMENTS: (I)

INSIDE "LICENSED PREMISES" AS DEFINED IN ARTICLE 2B OF THE MARYLAND CODE; (II) ON COMMERCIAL VEHICLES USED FOR TRANSPORTING ALCOHOLIC BEVERAGES; OR (III) IN CONJUNCTION WITH A 1-DAY ALCOHOLIC BEVERAGES LICENSE OR A TEMPORARY LICENSE GRANTED BY THE BOARD OF LICENSE COMMISSIONERS;

2. ANY SIGN THAT CONTAINS THE NAME OR SLOGAN OF THE "LICENSED PREMISES" THAT HAS BEEN PLACED FOR THE PURPOSE OF IDENTIFYING THE "LICENSED PREMISES";
3. EXCEPT FOR BILLBOARDS AND FREESTANDING SIGNBOARDS, ANY SIGN FOR WHICH ZONING BOARD APPROVAL OR A MINOR PRIVILEGE PERMIT IS REQUIRED;
4. ANY SIGN THAT CONTAINS A GENERIC DESCRIPTION OF BEER, WINE, LIQUOR, OR SPIRITS, OR ANY OTHER GENERIC DESCRIPTION OF ALCOHOLIC BEVERAGES;
5. ANY NEON OR ELECTRICALLY CHARGED SIGN ON "LICENSED PREMISES" THAT IS PROVIDED AS PART OF A PROMOTION OF A PARTICULAR BRAND OF ALCOHOLIC BEVERAGE;
6. ANY SIGN ON AN MTA VEHICLE OR A TAXICAB;
7. ANY SIGN ON PROPERTY OWNED, LEASED OR OPERATED BY THE MARYLAND STADIUM AUTHORITY;

8. ANY SIGN AT MEMORIAL STADIUM;

9. ANY SIGN AT A FACILITY THAT OPERATES IN ACCORDANCE WITH A LICENSE ISSUED UNDER § 11-304 OF THE BUSINESS REGULATION ARTICLE OF THE MARYLAND CODE;

10. ANY SIGN ON PROPERTY ADJACENT TO AN INTERSTATE HIGHWAY; OR

11. ANY SIGN LOCATED: (I) IN A B-4 ZONE, (II) IN A M-3 ZONE MORE THAN 1,000 FEET FROM THE BOUNDARY OF ANY OTHER ZONE WHICH IS NOT A B-4 OR M-3 ZONE, (III) IN A M-3 ZONE MORE THAN 500 FEET FROM THE BOUNDARY OF ANY OTHER ZONE WHICH IS NOT A B-4 OR M-3 ZONE PROVIDED SUCH SIGN FACES AWAY FROM SUCH OTHER ADJOINING ZONE.

20. Section 1 of Bill No. 626 also amended the Baltimore City Code (1983 replacement volume, as amended) to add Section 11.0-7 to Article 30, Zoning, Chapter 11, Administration and Enforcement, to read as follows:

Chapter 11—Administration and Enforcement

11.0-7 Penalties for violation.

Any person who violates, disobeys, omits, neglects, refuses to comply with, or resists the enforcement of any of the provisions of this ordinance shall be guilty of a misdemeanor and, upon conviction in any court of competent jurisdiction, shall be fined not less than 25 nor more than 500 dollars; ANY PERSON FOUND GUILTY OF VIOLATING A PROVISION OF SECTION 10.0-1h MAY BE FINED UP

TO 1,000 DOLLARS. Every such person shall be deemed guilty of a separate offense for every day such violation shall continue after notification thereof.

21. Section 2 of Bill No. 626 states that:

AND BE IT FURTHER ORDAINED, That this ordinance may only be applied to or interpreted to have an effect on any contract executed after the effective date of this ordinance and to any renewal term of a preexisting contract beginning after the effective date of this ordinance.

22. Section 3 of Bill No. 626 states that:

AND BE IT FURTHER ENACTED, That this ordinance shall take effect on the 30th day after the date of its enactment.

23. The Mayor of the City signed Bill No. 626 on January 6, 1994, which is deemed the date of the enactment of Bill No. 626.

24. On information and belief, the City intends to enforce the aforesaid provisions of Bill No. 626.

25. Penn Advertising will be required to remove advertisements disseminating messages concerning alcoholic beverages from its billboards that are subject to the prohibitions of Bill 626 on or before February 5, 1994. Penn Advertising also will be prohibited from disseminating messages concerning alcoholic beverages on billboards subject to the prohibitions of Bill No. 626 after February 5, 1994.

26. The enactment of Bill No. 626 and the enforcement by the City of Bill No. 626 have caused and will cause Penn Advertising irreparable harm, in that Penn Advertising will be required to remove advertisements disseminating messages concerning alcoholic beverages from its billboards and to cease placing such advertisements on its billboards subject to the prohibitions of Bill

No. 626 in the future, thereby depriving Penn Advertising of its constitutional right to engage in speech protected by the First Amendment of the Constitution of the United States and Article 40 of the Declaration of Rights of the Maryland Constitution.

27. Penn Advertising is in doubt as to its rights and the duties and obligations imposed by the provisions of SB 808 and Bill No. 626, and is in fear of the imposition of civil and criminal penalties by the City of Baltimore in the event that it attempts to exercise its constitutional right to engage in protected speech.

28. There is a bona fide, actual, justiciable controversy existing between the parties hereto.

29. As more specifically alleged below, Penn Advertising has no adequate remedy at law, and there is an actual, practical and present need for declaratory and injunctive relief because, unless enjoined, the City's actions will result in loss of Penn Advertising's substantial rights.

30. All conditions precedent to the relief demanded herein have either been performed or have occurred.

COUNT I

(FIRST AMENDMENT—VOID FOR VAGUENESS)

31. Plaintiff realleges the allegations in paragraphs 1 through 30 as though fully set forth herein.

32. Article 30, Section 10.0-1H the Baltimore City Code fails to define the messages that constitute prohibited alcoholic beverage advertising with sufficient specificity to allow a person wishing to disseminate messages regarding alcoholic beverages to know whether such speech in "publicly visible locations" would constitute a criminal act.

33. Accordingly, the provisions of Article 30, Section 10.0-1H constitute an unconstitutionally vague restraint upon protected speech in violation of the First and Four-

teenth Amendments of the United States Constitution and Article 40 of the Declaration of Rights of the Maryland Constitution and are therefore invalid.

COUNT II

(FIRST AMENDMENT—VOID FOR VAGUENESS)

34. Plaintiff realleges the allegations in paragraphs 1 through 30 as though fully set forth herein.

35. Section 222, which purportedly authorizes the City to enact prohibitions on alcoholic beverage advertising fails to define the messages that the City purportedly is permitted to prohibit with sufficient specificity to allow a person wishing to disseminate messages regarding alcoholic beverages to know whether such speech in "publicly visible locations" would constitute a criminal act.

36. Accordingly, the provisions of Section 222 constitute an unconstitutionally vague restraint upon protected speech in violation of the First and Fourteenth Amendments of the United States Constitution and Article 40 of the Declaration of Rights of the Maryland Constitution and are therefore invalid.

COUNT III

(FIRST AMENDMENT—OVERBROAD CONTENT-BASED RESTRAINT OF PROTECTED SPEECH)

37. Plaintiff realleges the allegations in paragraphs 1 through 30 as though fully set forth herein.

38. The dissemination of messages regarding alcoholic beverages in "publicly visible locations" is constitutionally protected expressive activity.

39. Article 30, Section 10.0-1H of the Baltimore City Code makes it a criminal act to disseminate alcoholic beverage advertising in "publicly visible locations" solely on the basis of its content.

40. Accordingly, the provisions of Article 30, Section 10.0-1H of the Baltimore City Code constitute an invalid content-based prohibition that restricts constitutionally protected speech in violation of the First and Fourteenth Amendments of the United States Constitution and Article 40 of the Declaration of Rights of the Maryland Constitution and are therefore invalid.

COUNT IV

(FIRST AMENDMENT—OVERBROAD CONTENT-BASED RESTRAINT OF PROTECTED SPEECH)

41. Plaintiff realleges the allegations in paragraphs 1 through 30 as though fully set forth herein.

42. The dissemination of messages regarding alcoholic beverages in "publicly visible locations" is constitutionally protected expressive activity.

43. Section 222, which purportedly authorizes the City to enact prohibitions that make it a criminal act to disseminate alcoholic beverage advertising in "publicly visible locations" solely on the basis of its content.

44. Accordingly, the provisions of Section 222 constitute an invalid content-based prohibition that restricts constitutionally protected speech in violation of the First and Fourteenth Amendments of the United States Constitution and Article 40 of the Declaration of Rights of the Maryland Constitution and are therefore invalid.

COUNT V

(FIRST AMENDMENT—STANDARDLESS DELEGATION OF ADMINISTRATIVE DISCRETION)

45. Plaintiff realleges the allegations in paragraphs 1 through 30 as though fully set forth herein.

46. Article 30, Section 10.0-1H of the Baltimore City Code fails to clearly specify precise standards that would enable the police and other officials of the City of Baltimore to determine from the provisions of this law the

content of those messages that would be criminal acts when disseminated in "publicly visible locations."

47. Accordingly, the provisions of Article 30, Section 10.0-1H of the Baltimore City Code constitute an invalid standardless delegation of unrestricted administrative discretion in violation of the First and Fourteenth Amendments to the United States Constitution and Article 40 of the Declaration of Rights of the Maryland Constitution and are therefore invalid.

COUNT VI

(FIRST AMENDMENT—STANDARDLESS DELEGATION OF ADMINISTRATIVE DISCRETION)

48. Plaintiff realleges the allegations in paragraphs 1 through 30 as though fully set forth herein.

49. Section 222, which purportedly authorizes the City to enact prohibitions on alcoholic beverage advertising, fails to clearly specify the precise standards that would enable the City to determine from the provisions of this law the content of those messages that would be prohibited from dissemination in "publicly visible locations."

50. Accordingly, the provisions of Section 222 constitute an invalid standardless delegation of unrestricted administrative discretion in violation of the First and Fourteenth Amendments to the United States Constitution and Article 40 of the Declaration of Rights of the Maryland Constitution and are therefore invalid.

COUNT VII

(FIRST AMENDMENT—INVALID CONTENT-BASED REGULATION FAVORING CERTAIN NONCOMMERCIAL SPEECH OVER OTHER NONCOMMERCIAL SPEECH)

51. Plaintiff realleges the allegations in paragraphs 1 through 30 as though fully set forth herein.

52. Article 30, Section 10.0-H of the Baltimore City Code exempts from its prohibitions certain categories of alcoholic beverage advertising that may include certain noncommercial messages.

53. Although Article 30, Section 10.0-1H of the Baltimore City Code creates certain exempt categories of alcoholic beverage advertising that may include noncommercial messages, the section makes it a criminal offense to disseminate other noncommercial messages at "publicly visible locations" that do not fall within these exempt categories of speech.

54. Accordingly, the provisions of Article 30, Section 10.0-1H constitute an invalid content-based restraint on protected noncommercial speech in violation of the First and Fourteenth Amendments to the Constitution of the United States and Article 40 of the Declaration of Rights of the Maryland Constitution and are therefore invalid.

COUNT VIII

(FIRST AMENDMENT—INVALID CONTENT-BASED REGULATION FAVORING CERTAIN NONCOMMERCIAL SPEECH OVER OTHER NONCOMMERCIAL SPEECH)

55. Plaintiff realleges the allegations in paragraphs 1 through 30 as though fully set forth herein.

56. Section 222, which purportedly authorizes the City to enact prohibitions on alcoholic beverage advertising, requires the City to exempt certain categories of commercial alcoholic beverage advertising that may include certain noncommercial messages from its prohibitions.

57. Although Section 222 requires that the City must exempt from any prohibition of alcoholic beverage advertising certain categories of such advertising that may include noncommercial messages, Section 222 purportedly authorizes the City to make it a criminal offense to disseminate other noncommercial messages at "publicly vis-

ible locations" that do not fall within these exempt categories of speech.

58. Accordingly, the provisions of Section 222 constitute an invalid content-based restraint on protected noncommercial speech in violation of the First and Fourteenth Amendments of the United States Constitution and Article 40 of the Declaration of Rights of the Maryland Constitution and are therefore invalid.

COUNT IX

(FIRST AMENDMENT—INVALID CONTENT-BASED REGULATION FAVORING CERTAIN COMMERCIAL SPEECH OVER OTHER NONCOMMERCIAL SPEECH)

59. Plaintiff realleges the allegations in paragraphs 1 through 30 as though fully set forth herein.

60. Article 30, Section 10.0-1H of the Baltimore City Code exempts from its prohibitions certain categories of alcoholic beverage advertising that may include commercial messages.

61. Although Article 30, Section 10.0-1H of the Baltimore City Code exempts from its prohibitions certain categories of alcoholic beverage advertising that may include commercial messages, the section makes it a criminal offense to disseminate other noncommercial messages at "publicly visible locations" that do not fall within these exempt categories of speech.

62. Accordingly, the provisions of Article 30, Section 10.0-1H constitute an invalid content-based restraint on protected noncommercial speech in violation of the First and Fourteenth Amendments to the Constitution of the United States and Article 40 of the Declaration of Rights of the Maryland Constitution and are therefore invalid.

COUNT X

(FIRST AMENDMENT—INVALID CONTENT-BASED REGULATION FAVORING CERTAIN COMMERCIAL SPEECH OVER OTHER NONCOMMERCIAL SPEECH)

63. Plaintiff realleges the allegations in paragraphs 1 through 30 as though fully set forth herein.

64. Section 222, which purportedly authorizes the City to enact prohibitions on alcoholic advertising, requires the City to exempt from these prohibitions certain categories of alcoholic beverage advertising that may include certain commercial messages.

65. Although Section 222 requires that the City must exempt from its prohibitions of alcoholic beverage advertising certain categories of such advertising that may include commercial messages, Section 222 purportedly authorizes the City to make it a criminal offense to disseminate other noncommercial messages at "publicly visible locations" that do not fall within these exempt categories of speech.

66. Accordingly, the provisions of Section 222 constitute an invalid content-based restraint on protected noncommercial speech in violation of the First and Fourteenth Amendments of the United States Constitution and Article 40 of the Declaration of Rights of the Maryland Constitution and are therefore invalid.

COUNT XI

(FIRST AMENDMENT—REGULATION OF COMMERCIAL SPEECH THAT DOES NOT ADVANCE ASSERTED GOVERNMENTAL INTEREST)

67. Plaintiff realleges the allegations in paragraphs 1 through 30 as though fully set forth herein.

68. The governmental interest purportedly advanced by the implementation of the provisions of Article 30, Section 10.0-1H is recited in the Preamble to Bill No. 626 as: ". . . the promotion of the welfare and temperance of minors exposed to such advertisements."

69. Accordingly, to the extent that the provisions of Article 30, Section 10.0-1H are intended to restrict the commercial advertising of alcoholic beverages, those provisions fail to directly advance to a material degree the purported governmental interest and therefore constitute an invalid restriction on protected commercial speech in violation of the First and Fourteenth Amendments to the United States Constitution and Article 40 of the Declaration of Rights of the Maryland Constitution and are therefore invalid.

COUNT XII

(FIRST AMENDMENT—REGULATION OF COMMERCIAL SPEECH THAT DOES NOT ADVANCE ASSERTED GOVERNMENTAL INTEREST)

70. Plaintiff realleges the allegations in paragraphs 1 through 30 as though fully set forth herein.

71. The governmental interest purportedly advanced by the implementation of the provisions of SB 808 is ". . . [t]he promotion of the welfare and temperance of minors."

72. Accordingly, to the extent that SB 808 is intended to authorize the City to restrict the commercial advertising of alcoholic beverages, the provisions of SB 808 fail to directly advance the governmental interest asserted in SB 808 and therefore constitute an invalid restriction of protected commercial speech in violation of the First and Fourteenth Amendments the United States Constitution and Article 40 of the Declaration of Rights of the Maryland Constitution and are therefore invalid.

COUNT XIII

(FIRST AMENDMENT—REGULATION OF COMMERCIAL SPEECH MORE EXTENSIVE THAN NECESSARY TO ACHIEVE ASSERTED GOVERNMENTAL INTEREST.)

73. Plaintiff realleges that allegations in paragraphs 1 through 30 and 68 as though fully set forth herein.

74. The provisions of Article 30, Section 10.0-1H of the Baltimore City Code are more extensive than necessary to serve the purported governmental interest and therefore constitute an invalid restriction on protected commercial speech is [sic] in violation of the First and Fourteenth Amendments to the United States Constitution and Article 40 of the Declaration of Rights of the Maryland Constitution and are therefore invalid.

COUNT XIV

(FIRST AMENDMENT—REGULATION OF COMMERCIAL SPEECH MORE EXTENSIVE THAN NECESSARY TO ACHIEVE ASSERTED GOVERNMENTAL INTEREST.)

75. Plaintiff realleges that allegations in paragraphs 1 through 30 and 71 as though fully set forth herein.

76. The provisions of SB 808 are more extensive than necessary to serve the purported governmental interest and therefore constitute an invalid restriction of protected commercial speech in violation of the First and Fourteenth Amendemnts to the United States Constitution and Article 40 of the Declaration of Rights of the Maryland Constitution.

77. Accordingly, the City of Baltimore lacked the authority under SB 808 to enact Article 30, Section 10.0-1H of the Baltimore City Code, which is therefore void and unenforceable.

COUNT XV

(MARYLAND CODE—EXCEEDING CITY'S DELEGATED AUTHORITY TO LEGISLATE)

78. Plaintiff realleges the allegations in paragraphs 1 through 30 as though fully set forth herein.

79. SB 808 prohibits the City of Baltimore from adopting any restriction on the dissemination of alcoholic beverage advertising in "publicly visible locations" unless ". . . the ordinance is necessary for the promotion of the welfare and temperance of minors exposed to advertisements for alcoholic beverages placed in publicly visible locations. . ."

80. The Preamble to Bill No. 626 sets forth the purported facts relied upon by the City Council of Baltimore for its determination that Article 30, Section 10.0-1H of the Baltimore City Code is necessary to promote the welfare and temperance of minors.

81. The asserted facts relied upon by the City Council of Baltimore do not support a determination that the prohibition of alcoholic beverage advertising in "publicly visible locations" in the City of Baltimore as set forth in Section 10.0-1H is necessary to promote the welfare and temperance of minors.

82. Accordingly, the City of Baltimore lacked the authority under SB 808 to enact Article 30, Section 10.0-1H of the Baltimore City Code, which is therefore void and unenforceable.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Penn Advertising prays:

A. That this Court enter a declaratory judgment, holding that the aforesaid SB 808 is unconstitutional, on its face or as applied to the Plaintiff, is null and void and of no legal effect, and is a legal nullity;

B. That this Court enter a declaratory judgment holding that the aforesaid Bill No. 626 is unconstitutional, null and void, and of no legal effect.

C. That this Court enter a declaratory judgment, holding that the aforesaid Bill No. 626 is null and void and of no legal effect and is a legal nullity because in enacting Bill No. 626, the Mayor and City Council exceeded the authority granted to them by SB 808 to enact legislation restricting alcoholic beverage advertising;

D. That this Court issue a preliminary injunction ordering the City, its officers, representatives, agents, employees, attorneys, persons acting in concert with the City and all other persons to refrain from enforcing the provisions of Bill No. 626 pending a final disposition of the merits of the underlying controversy.

E. That this Court enter an order permanently enjoining the City and all other persons from enforcing the provisions of the aforesaid Bill No. 626;

F. That this Court award Plaintiff Penn Advertising's costs, attorneys' fees, damages and such other and further relief as may be just in the premises.

Respectfully submitted,

RUBIN, WINSTON, DIERCKS, HARRIS & COOKE

/s/ Jeffrey Harris

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Dated January 21, 1994

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action No. HAR 94-117

ANHEUSER-BUSCH, INC.,
Plaintiff,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE CITY, *et al.*,
Defendants.

AFFIDAVIT OF JOHN E. CALFEE IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

STATE OF MARYLAND)
) ss.:
COUNTY OF MONTGOMERY)

JOHN E. CALFEE, being duly sworn, deposes and says:

1. I am a Visiting Fellow at the Brookings Institution and an adjunct scholar at the American Enterprise Institute. The views presented here are my own, not those of the Brookings Institution. I submit this affidavit in support of the motion of plaintiff Anheuser-Busch, Inc. ("Anheuser-Busch") for a preliminary injunction against enforcement of Section 10.0-1h of the Baltimore Zoning Law (the "Ordinance"), which outlaws most outdoor advertising for alcoholic beverages in Baltimore in an attempt to promote temperance among minors.

2. I received a Ph.D. in economics from the University of California at Berkeley in 1980. From 1980 through 1986, I served in the Bureau of Economics at the Federal Trade Commission ("FTC"). During my tenure at the FTC, I worked on advertising regulation and other consumer protection matters. After leaving the FTC and continuing until this past June, I taught marketing and consumer behavior courses at the University of Maryland and Boston University, and conducted research on the effects of advertising. It is my expert opinion that advertising has no discernable effect on market-wide consumption of alcoholic beverages, including consumption by minors.

3. I have written extensively for academic journals in the area of advertising regulation. Most recently, in 1993 I completed a report on the effects of alcoholic beverage advertising entitled "The Influence of Advertising on Alcohol Consumption: An Econometric Analysis of Selected European Nations." This report (in which I was assisted by Carl Scheraga) will soon be published in the *International Journal of Advertising*. My 1993 report is attached hereto as Exhibit 1. A complete list of articles I have published is included as part of my curriculum vitae which is attached hereto as Exhibit 2.

4. The stated goal of the Ordinance is to promote the welfare and temperance of minors. As made plain in the Preamble, the Ordinance rests on the assumption that a ban on outdoor advertisements of alcoholic beverages will reduce consumption of alcoholic beverages by persons under the age of twenty-one. That assumption is contrary to the prevailing scholarly understanding of the effects of advertising and the great weight of scientific evidence.

5. In essence, the Ordinance reflects an incorrect view of the effects of advertising. In my opinion, it is very unlikely that advertising will increase total sales in a mature market. A mature market is a market for an established product, such as beer, rather than a new

product. In a mature market, the dominant effect of advertising is to capture market share from competitors, not to increase overall consumption of the advertised product.

Leading Reviews of the Scholarly Literature

6. There is a large body of scholarly research that specifically considers the effects of alcoholic beverage advertising on consumption. Although this research employs a wide variety of techniques, it consistently finds that advertising has no detectable influence on overall levels of consumption. I will briefly describe the leading studies, and attach copies of them in the event the Court wishes to examine them in greater detail.

7. The most comprehensive and authoritative report on the effects of alcoholic beverage advertising on consumption was published by the FTC in 1985. In that report, the FTC staff reviewed all of the existing research literature on the effects of alcoholic beverage advertising. Based on this review, the FTC report concluded at page 2 that there was "no reliable basis to conclude that alcohol advertising significantly affects consumption." A copy of the FTC study is attached hereto as Exhibit 3.

8. In 1988, Reginald G. Smart, a prominent scholar at the government-funded Addiction Research Center in Ontario, Canada, reviewed the same body of literature, as well as studies published subsequently to the FTC report, in an article entitled "Does Alcohol Advertising Affect Overall Consumption? A Review of Empirical Studies." Dr. Smart similarly states in the abstract (page 316) for his review his conclusion that "total advertising expenditures have no reliable correlation with sales of alcohol beverages," and "in general, the evidence indicates little impact of alcohol advertising on alcohol sales or drinking." A copy of Dr. Smart's study is attached hereto as Exhibit 4.

9. Another recent and very thorough review of the literature on alcoholic beverage advertising was conducted by Joseph Fisher in his 1993 book, *Advertising, Alcohol Consumption, and Abuse: A Worldwide Survey*. He concluded at page 142 that "no experimental evidence exists" that advertising affects consumption, that "quasi-experiments" (by which he means consumer surveys) suggest no more than that advertising may account for less than 4% of the variation in consumption of alcoholic beverages, that "Econometric studies find no effect [on total consumption] for advertising in the United States" and that advertising effects estimated outside the United States are "diminished to the point of nonexistence," and that when one assesses the effects of "changes in advertising that have occurred in the market, . . . brand and category shares change, [but] total alcohol consumption is unaffected." The title page and "Summary and Conclusions" chapter of Dr. Fisher's book is attached hereto as Exhibit 5.

10. As part of my 1993 report, I myself conducted yet another review of the literature on the effects of alcoholic beverage advertising on total alcohol consumption, including the research that has appeared since Smart's survey. The studies published since the FTC and Smart reviews provide no reason to alter the conclusions reached in the earlier reviews. Rather, recent research (including my own, which is described below) has reinforced the view that alcoholic beverage advertising does not have a significant effect on consumption. *See* Exhibit 1 at 3-20.

11. I wish to emphasize that a wide variety of methods were employed in the research literature examined by the FTC report, Dr. Smart's study, Dr. Fisher's review any my own report. What makes this research literature so forceful is the consistency of results despite the use of radically different approaches. Research on alcoholic beverage advertising has taken four basic approaches. The

first uses actual market data—including advertising expenditures, recorded alcohol consumption, prices of alcoholic beverages, and so on—in order to isolate the effects of advertising after taking into account the effects of other forces such as prices and consumer incomes. The second approach also uses actual market data, but focuses specifically on the effects of partial or complete bans on alcoholic beverage advertising. Again, the goal is to isolate the effects of advertising restrictions after taking into account other factors. The third approach involves "experiments" in which advertising's effects are examined in a controlled environment. The fourth (and on the whole the least useful) approach is to conduct surveys on drinking attitudes or drinking behavior, and on exposure to advertising, in order to discover whether there is a relationship between advertising and either attitudes or behavior. As the FTC staff, Dr. Smart and Dr. Fisher recognized, and I will explain in greater detail below, no substantial causal connection between advertising and consumption has been found regardless of the research approach chosen.

Research Using Actual Market Data on Advertising and Sales

12. The leading market data study of the United States, was published by George Franke and Gary Wilcox in 1987, and entitled "Alcoholic Beverage Advertising and Consumption in the United States." The authors concluded at page 28 of their report that advertising did not substantially affect total consumption, and noted that such a conclusion was consistent with previous research on other nations. A copy of the Franke and Wilcox study is attached hereto as Exhibit 6.

13. Market data on markets in other nations also support the finding that advertising has little or no effect on total consumption. Martyn Duffy has produced a series of studies of the United Kingdom alcoholic bev-

erage market. Using a variety of data bases and statistical methods, he concluded that advertising bans would have little or no effect on sales, and cited numerous other studies of the United Kingdom market that reached essentially the same conclusion. A copy of the most recent Duffy study is attached hereto as Exhibit 7.

14. As part of my 1993 report, I completed a study using the market data approach. I conducted a statistical analysis of alcoholic beverage advertising and sales in the United Kingdom, France, Germany, and the Netherlands and found that advertising had no effect on consumption in any of these nations. *See* Exhibit 1 at 42-43. Market data from five major Western nations has now been examined in our research or in other studies already cited. In no case has the analysis revealed any significant connection at all (not to mention a causal connection) between advertising and total alcohol consumption.

Research on Partial or Complete Advertising Bans

15. Researchers who take the second approach use market data to analyze the effects of partial or complete bans on alcoholic beverage advertising. Here, too, the results consistently fail to show that advertising has a significant effect on consumption.

16. The reviews conducted by the FTC staff, by Dr. Smart, by Dr. Fisher and myself examined the existing research on the effects of advertising bans. All these reviews concluded that careful comparisons of market sales and other factors before and after imposition of an advertising ban provide no reason to think that the bans reduced total consumption of alcoholic beverages. *See* Exhibit 3, Appendix A at 11-12; Exhibit 4 at 316; Exhibit 5 at 116-120; Exhibit 1 at 10-11.

17. A study conducted by Alan C. Ogborne and Reginald Smart examined data on advertising bans in Canada and the United States. The Canadian data compared

alcohol consumption during a particular time period in two provinces, one of which imposed an advertising ban midway through the time period. The study found no apparent effect from the ban. The same conclusion was reached based on data concerning advertising bans in certain of the United States. A copy of the Ogborne and Smart study is attached hereto as Exhibit 8.

18. A recent study by Henry Saffer found that European nations that had restricted alcohol advertising had lower levels of alcoholic beverage consumption. Dr. Saffer's study did not attempt to assess whether lower consumption was caused by the advertising restrictions, however. A vigorous critique of this study by Douglas Young pointed out that the data strongly indicate that lower drinking rates were probably the cause of the advertising bans (rather than the other way around), and that partial advertising bans are associated with *increases* rather than decreases in alcoholic beverage consumption. Dr. Saffer's study is attached hereto as Exhibit 9. Dr. Young's critique is attached hereto as Exhibit 10.

Research Using Controlled Environments

19. By employing the third approach, namely, experiments, several researchers have attempted to assess the effect of advertising under controlled conditions. The usual approach is to randomly select people into two or three groups, each of which is shown different sets of advertisements. The researchers then examine whether the groups that viewed alcoholic beverage advertisements purchased or drank more alcohol than the groups that did not. Again, the results of these experiments demonstrate a lack of effect on consumption from advertising of alcoholic beverages.

20. The results of the most recent experimental study, by Angela Lipsitz, Greg Brake, Eric John Vincent and

Mark Winters, are most telling. These researchers conducted an experiment in which 5th and 8th graders were divided into three groups that watched either soft-drink commercials, beer commercials that included anti-drinking messages, or beer commercials that did not include anti-drinking messages. After watching the commercials, the three groups did not express any significant differences in their attitudes about drinking. In the abstract at page 439 of their report, the authors state their conclusion that "[t]he failure of beer commercials to create positive alcohol expectancies is consistent with limited and null findings of previous investigations. Research to date does not support a ban on alcohol advertising." They also state that "[t]heoretically, a ban makes sense; empirically, it cannot yet be justified." A copy of the Lipsitz, Brake, Vincent and Winters study is attached hereto as Exhibit 11.

The Prevention Committee Report and Its Attempted Reliance on Surveys

21. A review of the Preamble to the Ordinance reveals that Baltimore ignored all the evidence described above, including the authoritative reports from the FTC staff and the Addiction Research Foundation. Instead, Baltimore unsuccessfully attempts to demonstrate a causal connection between advertising and alcohol consumption based on a recent report by the Prevention Committee of Maryland Governor Schaefer's Drug and Alcohol Abuse Commission (the "Prevention Committee Report"). The Prevention Committee Report is attached hereto as Exhibit 12.

22. The Prevention Committee Report ignored the bulk of the research literature on the effects of alcoholic beverage advertising and reviewed an extremely selective sample of the literature. Although the Prevention Committee Report stated at page 13 that it had reviewed "scores of studies, reports and articles on alcohol adver-

tising," I found only eight items in the list of references that specifically addressed alcohol advertising, and some of these items derived from a single study. From the vast body of academic literature on alcoholic beverage advertising, the Prevention Committee Report selected only three studies for review: a federally funded project by Charles Atkin and Martin Block, a report by Donald Strickland, and an unpublished report for the American Automobile Association by Lawrence Wallack, Diana Cassady and Joel Grube.

23. Each of the above studies relied on by the Prevention Committee Report consists primarily of consumer surveys. As I mentioned earlier, surveys are another of the research methods used to study the effects of alcoholic beverage advertising. A survey is essentially a questionnaire. Typical questions ask about drinking attitudes, drinking behavior, amount of exposure to advertising or a particular advertising medium (usually television), and attitudes toward advertising. The researchers then attempt to draw connections between advertising and consumption of alcoholic beverages based on the survey responses.

24. Surveys, however, are of limited usefulness because they only reveal correlations or patterns of facts, without explaining whether causal relationships exist among the various facts. In other words, surveys cannot explain why a correlation exists, and therefore, can provide little if any information as to *why* people drink. For example, a survey may reveal that beer drinkers are more aware than non-drinkers of beer advertisements. The surveys cannot explain, however, whether the advertisements caused viewers to drink beer, or whether people who drink are more inclined to pay attention to advertisements for beer, or whether some third factor led both to beer consumption and to a tendency to enjoy beer advertisements. In fact, the most frequent criticism leveled at survey results is that surveys reveal little beyond the fact

that people who drink pay more attention than non-drinkers to alcoholic beverage advertisements. This observation applies quite generally to product markets—or as some people have said, "Volvo owners watch Volvo ads."

25. Despite this inherent limitation, researchers do use surveys to gain insight into drinking trends, and again the results are consistent with findings from other research methods that advertising does not have a significant impact on underage drinking. Even where surveys reveal correlations in which people who react positively to alcoholic beverage advertising also drink alcoholic beverages, researchers are very reluctant to conclude that advertising *caused* such behavior.

26. The survey results are notable for what they do *not* demonstrate about advertising; namely, that it is a reason why people drink. The largest single body of survey data comes from a federally funded project by Charles Atkin and Martin Block, upon which the authors of the Prevention Committee Report heavily relied. The results of this study were published by Dr. Atkin and various co-authors over a period of several years. One article, published by Dr. Atkin with Kimberly Neuendorf and Steven McDermott, describes a survey in which teenagers and young adults were asked about their exposure to alcoholic beverage advertising, their drinking behavior, and the extent to which they perceived advertising as influencing their choices about whether to drink and how much to drink. The survey revealed that to a small extent, persons who engaged in abusive drinking tended to see more alcoholic beverage advertising than persons who did not engage in abusive drinking. The authors did not attempt, however, to demonstrate that advertising was a *cause* of the abusive behavior. In fact, the authors warned at pages 323-324 that one could not infer from these results that advertising was a cause of the hazardous be-

havior. A copy of the Atkin, Neuendorf and McDermott study based on the Atkin and Block survey is attached hereto as Exhibit 13.

27. A second article based on the Atkin and Block survey, written by Charles Atkin, John Hocking, and Martin Block, describes the results of asking teenagers about their alcohol consumption and their exposure to mass media. They found that teenagers who drank or who were more interested in drinking tended to see more advertising for alcoholic beverages. The authors did not attempt to demonstrate that advertising caused teenagers to consume alcohol or to be interested in alcoholic beverages. Rather, they warned at page 165 that "[a]dvertising is not necessarily the causal event in the relationship." A copy of the Atkin, Hocking, and Block study, also based on the Atkin and Block survey, is attached hereto as Exhibit 14.

28. Surveys by Donald E. Strickland, upon which the Prevention Committee Report also relied, reached similar conclusions. Dr. Strickland asked a large sample of adolescents whether they drank alcoholic beverages and about their drinking behavior. He also asked how much television they watched and what types of programs they preferred. As with the Atkin and Block survey, the goal of Dr. Strickland's survey was to determine the amount of exposure to alcoholic beverage advertising and to assess whether exposure to advertisements was related to drinking behavior. A complex analysis of the data revealed only a very small correlation between advertising exposure and drinking behavior. Strickland concluded at 318 that his "findings fail to sustain the argument that alcohol advertising is a primary factor in drinking behavior," and that "reducing the amount of advertising for alcoholic beverages is likely to have a negligible impact on the level of consumption among teenagers." A copy of the Strickland survey report is attached hereto as Exhibit 15.

29. Lawrence Wallack, Diana Cassady and Joel Grube conducted a survey of young people for the American Automobile Association. They found that exposure to beer advertising was positively correlated to several measures including brand recognition and recall, drinking expectations for adulthood, and beliefs about social aspects of drinking. They did not attempt, however, to demonstrate a causal relationship between advertising and these attitudinal and awareness measures. A copy of the Wallack, Cassady and Grube survey report is attached hereto as Exhibit 16.

30. Researchers have strongly criticized attempts to conclude, based on survey results, that alcoholic beverage advertising causes consumption. Dr. Strickland, one of the authorities that the Prevention Committee Report relied upon, criticized numerous aspects of the Atkin and Block study, and specifically criticized inferences from the Atkin and Block study that advertising is a cause of underage drinking. Dr. Strickland's critique of the Atkin and Block study is attached hereto as Exhibit 17.

31. In its review of the literature on alcoholic beverage advertising, the FTC staff specifically addressed the Atkin and Block survey, and stated at 21 that ". . . the general conclusion is that the work of Atkin & Block suffers from methodological flaws serious enough that it cannot be used to draw any conclusions concerning the effect of advertising on the total demand for alcohol or on the degree of alcohol abuse." *See* Exhibit 3 at page 121. Dr. Smart, in his review of the literature on the effects of alcoholic beverage advertising, also specifically stated at page 317 that "[w]e should be wary about the correlations in Atkin and Block's study and reject the conclusion that alcohol advertising leads to or causes drinking or heavy drinking." *See* Exhibit 4 at page 317.

32. Drs. Atkin and Block themselves emphasized in their original report that their surveys found no more

than a correlation between advertising and actual behavior, and that their data provided little reason to conclude that the advertising *caused* drinking behavior. On page 1 of their Executive Summary, they stated ". . . the design of these studies does not enable cause and effect to be inferred. If the analyses show that two or more variables are positively related (*e.g.*, higher levels of reported advertising exposure are associated with higher levels of drinking), it should not be concluded that one variable is necessarily causing the other. It is possible that reverse causation may be operating (*e.g.*, drinking may cause exposure, rather than exposure causing drinking), or that the two variables are related because of some common outside forces." They add, ". . . these findings should be regarded as suggestive and tentative rather than definitive." A copy of the title page and Executive Summary of the original Atkin and Block report is attached hereto as Exhibit 18.

33. When later publications tried to use Atkin and Block's survey results to claim a stronger, causal relationship between advertising and consumption, Dr. Block himself objected. In an appearance at hearings before the United States Senate, Dr. Block repudiated suggestions that his research documented a significant relationship between youth exposed to advertising and problem drinking. At page 2 of his testimony transcript, Dr. Block stressed that his study "provides no justification for restrictions on or curtailment of alcohol advertisements." Dr. Block's Senate testimony is attached hereto as Exhibit 19.

34. Baltimore's reliance on surveys to support the premise that there is a causal link between advertising and drinking vastly overstates the findings of those studies and ignores the qualifications that the researchers themselves imposed on the survey findings. Moreover, none of the studies cited in the Prevention Committee Report

and relied upon by Baltimore even attempted to assess how advertising affects behavior in actual markets. Indeed, the Prevention Committee Report ignored the entire body of market data studies, which consistently failed to find any connection between advertising and consumption. *See* this Affidavit at pages 6-8.

35. The Prevention Committee Report also refers briefly to a U.S. Department of Health and Human Services Report entitled "Seventh Special Report to the U.S. Congress on Alcohol and Health" (the "Special Report") as evidence that children acquire expectations of drinking before they ever begin to drink. However, the Prevention Committee Report fails to mention that the Special Report does not attribute the creation of expectations to advertising. The "Special Report" concludes at page 211 that "research has yet to document a strong relationship between alcohol advertising and alcohol consumption." A copy of chapter IX of the Special Report is attached hereto as Exhibit 20.

The Primary Influences on Underage Drinking

36. Contrary to the view presented by the Prevention Committee Report, the central finding in research on the sources of drinking behavior has been that drinking decisions are dominated not by advertising, but by social forces, especially the influences of parents and peers. This is apparent in the literature review cited above by Dr. Smart of the Addiction Research Foundation, who states at page 315 of his review that "[b]ecause factors such as price and social influences most affect decisions to drink, the influence of advertising is likely to be relatively small." *See* Exhibit 4 at 315. The dominance of social factors is also illustrated in original research by Dr. Smart on the demand for various products including alcoholic beverages. A copy of Dr. Smart's 1987 review of social factors in drinking is attached hereto as Exhibit 21.

37. Dr. Strickland, whose research was relied upon in the Prevention Committee Report, specifically stated that in his research ". . . advertising was shown to have meagre effects on the level of consumption, and these effects rarely translated into effects on alcohol problems," and that "[i]n contrast to the advertising effects, a set of interpersonal influences, especially differential peer association, was shown to have significant impact on both consumption levels and alcohol abuse behavior." These remarks are contained at page 221 in a 1983 review article by Dr. Strickland attached hereto as Exhibit 22.

Recent Trends in Alcoholic Beverage Consumption and Advertising

38. Recent trends in alcohol consumption belie the Ordinance's basic premise. Despite very large changes in the volume of beer advertising—including a nearly threefold increase between 1974 and 1986, followed by a steep drop in the early 1990s to approximately the level of 1978—overall consumption remained essentially constant. A chart based on data from the Beer Institute reflects this fact and is attached hereto as Exhibit 23.

39. Data from the U.S. Department of Health and Human Services show that beer consumption trends in the State of Maryland have closely paralleled those in the United States as a whole, and that total alcohol consumption has declined more rapidly in Maryland than in the rest of the nation. The federal report containing these data are attached hereto as Exhibit 24.

40. The patterns of advertising and consumption in the United States beer market are typical of trends in other developed economies. In France, for example, advertising expenditures for all alcoholic beverages more than tripled between 1977 and 1989, while per capita consumption decreased about 15%. A figure illustrating these data is attached hereto as Exhibit 25. In Sweden,

by contrast, all advertising for alcoholic beverages was banned in 1978, yet consumption since then has declined by only about 3%. Swedish data are presented in Figure 5 of my 1993 report. *See* Exhibit 1 at page 26. The British, German and Dutch markets, in which alcoholic beverage advertising was permitted, revealed negligible increases or, more often, decreases in total alcoholic beverage consumption during the past fifteen or twenty years, despite in some cases great increases in total expenditures for alcoholic beverage advertising. *See* Exhibit 1 at pages 24 and 25, Figures 2 through 4.

41. Moreover, in the face of large increases in beer advertising in this country, teenage drinking and abuse have actually declined. The National Institute for Drug Abuse and the University of Michigan issued a report entitled "Drug Use Among American High School Seniors." This report shows that teenage drinking declined steadily throughout the 1980s into the 1990s. A chart reflecting these figures is attached hereto as Exhibit 26. Similarly, the National Highway Traffic and Safety Administration ("NHTSA") has published figures that show that traffic fatalities involving teenagers and drunk driving have declined 47 percent since 1982. A chart based on NHTSA data is attached hereto as Exhibit 27.

42. Data for the State of Maryland also show substantial improvements in recent years. During 1982-1992, the number of drivers under age twenty-one who were involved in fatal accidents and had a blood alcohol content (B.A.C.) of 0.10% or greater declined from about 40 in the peak year of 1985 to about 10 in 1992 (a 75% reduction). A similar reduction occurred for drivers with lesser blood alcohol (B.A.C. of 0.01-0.09%). Overall, the proportion of under-21 drivers involved in fatal accidents who had positive B.A.C. levels has declined from over 40% to 17%. A chart reflecting these figures is attached hereto as Exhibit 28.

43. To sum up, the proposal to eliminate alcoholic beverage advertising on billboards in Baltimore has been presented as a means to reduce underage consumption of alcoholic beverages and thus "promote" temperance. This proposal rests upon an incorrect view of how advertising works and of the factors that lead to drinking. While there is no serious question that advertising can affect sales of brands, decades of research have failed to find a causal relationship between advertising and the total consumption of alcoholic beverages. Indeed, this research strongly suggests that such a connection does not exist. The research findings are consistent with recent trends which show that teenage consumption and abuse of alcoholic beverages has declined despite substantial increases in the number of beer advertisements. Rather than enacting advertising restrictions, a far more promising approach for Baltimore would be to provide educational programs designed to assist children in resisting the pressures and influences that lead to drinking and abuse.

/s/ John E. Calfee

JOHN E. CALFEE

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action No. HAR-94-145

PENN ADVERTISING OF BALTIMORE, INC.,
Plaintiff,

v.

THE MAYOR AND CITY COUNCIL
OF THE CITY OF BALTIMORE, *et al.*,
Defendants.

DECLARATION OF JAMES W. FISHER, II

I, James W. Fisher, II, hereby declare and state as follows:

1. My name is James W. Fisher, II. I have over sixteen years of experience in the outdoor advertising industry and presently serve as the General Manager of Penn Advertising of Baltimore, Inc. ("Penn Advertising"). In that capacity, I am personally familiar with the business of Penn Advertising. Accordingly, I am aware of the impact that enforcement of Article 30, Section 10.0-1(H) and Article 30, Section 11.0-7 of the Baltimore City Code, as promulgated by City Council Bill No. 626 (collectively referred to as the City of Baltimore's "Advertising Ban"), which was enacted on or about January 6, 1994, will have on the business of Penn Advertising when it becomes effective on February 5, 1994.

2. Penn Advertising is a Delaware Corporation authorized to do business in the City of Baltimore and elsewhere in the State of Maryland. Penn Advertising's prin-

cipal place of business is in the City of Baltimore at 3001 Remington Avenue, Baltimore, Maryland 21211.

3. Penn Advertising is in the outdoor advertising business in the City of Baltimore and elsewhere in the State of Maryland. Penn Advertising leases land from private property owners and erects and maintains outdoor advertising sign structures on those locations. Penn Advertising then disseminates commercial and noncommercial advertising on its sign structures and makes these sign structures available to the public for the dissemination of commercial and noncommercial messages. Outdoor advertising signs were among the first mass media for communications in the City of Baltimore. Penn Advertising's lineal predecessor company began operations in the 1800's. Outdoor advertising signs have been used as a medium to disseminate alcoholic beverage advertising in the City of Baltimore for many decades.

4. Advertising messages concerning alcoholic beverages are among the advertising messages that Penn Advertising has disseminated in the past, is currently disseminating, and intends to disseminate in the future on its signs in the City of Baltimore. The messages are truthful and concern products that are lawful in the City of Baltimore and the State of Maryland.

5. As a result of the enactment of the Advertising Ban, Penn Advertising will be required to remove many advertisements concerning alcoholic beverages from its billboards on or before February 5, 1994. As preexisting contracts for the remaining alcoholic beverage advertisements expire, Penn Advertising will no longer be able to post advertisements concerning alcoholic beverages on any of its billboards subject to the prohibitions of the Advertising Ban.

6. I am concerned that the Advertising Ban imposes criminal liability upon myself, the employees of Penn

Advertising, and Penn Advertising itself. Accordingly, I am deeply concerned that the City of Baltimore will institute criminal prosecutions against myself, the employees of Penn Advertising, and Penn Advertising during the pendency of Penn Advertising's suit challenging the Advertising Ban. Neither Penn nor I am willing to risk this threatened criminal prosecution. Therefore, Penn Advertising will be forced to comply with the prohibitions contained in the Advertising Ban during the pendency of Penn Advertising's suit challenging the Advertising Ban unless the City is prevented by the United States District Court from enforcing the Advertising Ban pursuant to a preliminary injunction.

7. In my professional opinion, other local Baltimore advertising media, such as newspapers, magazines, radio and television stations and Oriole Park at Camden Yards, will also attempt to use the prohibitions in the Advertising Ban and the general obloquy that the Advertising Ban casts on billboards to divert advertising for alcoholic beverages and other products and services from Penn Advertising to these other media. For example, Mass Transit Communications ("MTC") holds a contract with the Mass Transit Authority of the State of Maryland ("MTA") for the placement of advertising on MTA busses. These are the busses that are used to transport thousands of children to school in the City of Baltimore each day. Recently, I saw a letter that MTC sent to certain alcoholic beverage advertisers describing the prohibitions on the placement of alcoholic beverage advertising on outdoor advertising signs contained the Advertising Ban and urging these advertisers to place alcoholic beverage advertising on MTA vehicles to replace the audience exposure they will lose as a result of the Advertising Ban. Thus, MTC has atempted to use the enactment of the Advertising Ban to divert advertising business from Penn Advertising's outdoor advertising signs to signs on MTA vehicles.

8. The adverse impact of the Advertising Ban on Penn Advertising described in paragraphs 6 and 7 above, will be very substantial. At the current time, I estimate that, when fully effective, the prohibitions contained in the Advertising Ban will cause Penn Advertising to lose advertising revenue of approximately $100,000 per month. This lost revenue cannot be made up from other advertisers in the short run. Even if the advertising loss can be made up in the long run with advertising for other products and services, which may or may not be possible, Penn Advertising will have to expend substantial time and expense in identifying, selling and servicing replacement advertisers. The revenue losses caused by the Advertising Ban may force Penn Advertising to remove some sign locations in Baltimore City in order to cut expenses. It would be extremely difficult and expensive for Penn Advertising to rebuild or replace these signs once they are removed due to zoning restrictions in the City of Baltimore.

9. The Advertising Ban will not merely cause Penn Advertising to lose alcoholic beverage advertisers. Advertising is a "hyper-competitive" and fickle enterprise. Once it became known that Penn Advertising was being criminally prosecuted for violating the Advertising Ban, some of Penn Advertising's clients that do not advertise alcoholic beverages would fear that the public might associate their unrelated products and services with Penn Advertising's criminal prosecution. These advertisers would cease using Penn Advertising's billboards to disseminate their message and would change their marketing strategy by developing advertising campaigns for alternative media.

10. Once an advertiser has moved its advertising dollars to other media, it will be extremely difficult for Penn Advertising to persuade the advertiser to move all of those diverted advertising dollars back to Penn Advertis-

ing, even if Penn Advertising can show the advertiser a court decision striking down the Advertising Ban's prohibitions. This is because a change in media strategy quickly becomes imbedded in an advertiser's overall marketing strategy. Once an advertiser changes this strategy, it becomes extremely costly and difficult for an advertiser to again readjust its strategies. Therefore, the Advertising Ban's prohibitions will cause Penn Advertising substantial and permanent injury unless this Court issues a preliminary injunction preventing enforcement of the Advertising Ban. The extent of such injury to Penn Advertising, even if the Court ultimately found the Advertising Ban to be invalid, would be difficult to quantify and probably would continue indefinitely into the future.

11. As the General Manager of Penn Advertising, I am both personally and professionally concerned that Penn Advertising not violate a law with criminal penalties. Unfortunately, the vague wording of the Advertising Ban has left me unsure as to what advertisements are permitted by the Advertising Ban.

12. I refer in the balance of this Declaration to advertisements that have previously appeared on Penn Advertising's signs in Baltimore to illustrate the uncertainty created by the Advertising Ban's wording. The examples I use certainly are not an exhaustive recitation of those advertisements that Penn Advertising has disseminated that may be prohibited by the Advertising Ban.

13. Exhibits A and B are photographs of advertisements for the "Budweiser International" horse race held at the Laurel Race Course. While these advertisements are promoting a horse race and not an alcoholic beverage, the name and logo of a well known beer are prominently displayed in the advertisements. Therefore, I am concerned that advertisements such as Exhibits A and B could be classified as advertisements that advertise alcoholic beverages. Penn Advertising and I simply do not

have any way of knowing with any degree of confidence whether or not Penn Advertising or I would be committing a crime under the Advertising Ban if Penn Advertising disseminated an advertisement similar to those in Exhibits A and B.

14. Exhibit C is an advertisement placed by Anheuser Busch, Inc., which includes the same "Eagle" logo that prominently appears on many of Anheuser-Busch's alcoholic beverage containers and in many of their alcoholic beverage advertisements. The advertisement also contains a picture of a mug of beer, together, with the words "Know When to Say When" and "Drink Responsibly." Other marketers of alcoholic beverages, such as the House of Johnnie Walker, have also sponsored advertisements on the themes of responsible drinking that similarly identify the advertiser (*see* Exhibit D). I am concerned that, since advertisements such as those depicted in Exhibits C and D address alcohol and disclose the sponsorship of marketers of alcoholic beverages, such advertisements arguably could be prohibited by the Advertising Ban. Penn Advertising and I simply do not have any way of knowing with any degree of confidence whether or not Penn Advertising would be committing a crime under the Advertising Ban if Penn Advertising ran advertisements similar to those depicted in Exhibits C and D.

15. Alcoholic beverage marketers also have sponsored advertisements on Penn Advertising's outdoor advertising signs which are not directly related to alcoholic beverages. Exhibit E contains an example of an advertisement for a fund raising cruise on the "Bay Lady" to benefit the Chesapeake Bay wherein Budweiser is identified in the advertisement as a co-sponsor. Budweiser also is identified as a co-sponsor of a recycling advertisement ("Don't Throw It Away"), which is included herein as Exhibit F, and as a sponsor of an advertisement urging support for the Lou Rawls' United Negro College Fund Telethon,

which is included herein as Exhibit G. All of these advertisements identified Budweiser as either the sponsor or a co-sponsor. I am concerned that public service advertisements like those in Exhibits E, F, and G can be viewed as advertisements that are prohibited by the Advertising Ban.

16. Beyond this, as the advertisements depicted in Exhibit H indicate, many advertisements displayed by alcoholic beverage marketers also name the alcoholic beverages being advertised and disseminate slogans, logos, and messages concerning alcoholic beverages. Each of these advertisements is prohibited by the Advertising Ban. The risk of criminal prosecution pursuant to the Advertising Ban will preclude Penn Advertising and I from disseminating advertisements similar to those in Exhibit H.

17. In conclusion, Penn Advertising will suffer very serious, indeed irreparable, injury unless this Court preliminarily enjoins the City from enforcing the Advertising Ban's prohibitions during the pendency of Penn Advertising's suit challenging the validity of the Advertising Ban. This injury will take two forms: serious, and probably unrecoverable, financial losses and the temporary abandonment of all messages that pertain to alcoholic beverages in any respect or which identify a marketer of alcoholic beverages as a sponsor.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 28, 1994.

/s/ James W. Fisher, II

JAMES W. FISHER, II

Supreme Court, U.S.
FILED
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(2)

No. 95-685

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ANHEUSER-BUSCH, INC. and PENN ADVERTISING OF BALTIMORE, INC.,

Petitioners,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE; KURT L. SCHMOKE, in his official capacity as Mayor of Baltimore City; CITY COUNCIL OF BALTIMORE CITY; and DAVID TANNER, in his official capacity as the General Superintendent of Zoning Administration and Enforcement,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondents urge that the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered 31 August 1995 be denied for the reasons set forth below.

STATEMENT

A. Comment On Petitioners' Request that this Petition be Held Pending Decision in *44 Liquormart v. Rhode Island*, No. 94-1140 (Argued November 1, 1995)

On November 1, 1995, this Court heard argument in *44 Liquormart Inc. v. Rhode Island*, 39 F.3d 5 (1st Cir. 1994), *cert. granted*, 115 S. Ct. 1821 (No. 94-1140). The question presented in that case is: "Whether Rhode Island may, consistent with the First Amendment, prohibit truthful, non-misleading price advertising regarding alcoholic beverages?" 115 S. Ct. 1821. The First Circuit upheld the prohibition because it found "inherent merit in the State's contention that competitive price advertising would lower prices, and that with lower prices there would be more sales," 39 F.3d at 7, and because the court determined the state was aided in satisfying its burden under *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980) by an added presumption of constitutionality deriving from the Twenty-First Amendment. 39 F.3d at 7.

By no means should the petition for certiorari in the instant case be held pending this Court's decision in 44

Liquormart. A summary reconsideration order would not be warranted in this case even if this Court reverses the First Circuit.

The Fourth Circuit did not mention, much less rely upon, the Twenty-First Amendment in concluding that Baltimore's enactment satisfied the *Central Hudson* test. Secondly, while the Fourth Circuit found a "logical nexus" between Baltimore's objective of reducing underage drinking and a prohibition against alcohol ads on billboards as a means of achieving that objective, *App.* 16a,[1] that conclusion is entirely consistent with this Court's identical conclusion that there is "an immediate connection between advertising and demand for electricity," *Central Hudson*, 447 U.S. at 569, and its repeated statement that restrictions on commercial speech may in appropriate circumstances be sustained based on "common sense," *e.g., Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 2378. *See also Dunagin v. City of Oxford*, 718 F.2d 738 (5th Cir. 1983) (en banc), *cert. denied*, 467 U.S. 1259 (1984) (common sense alone, whether or not supported by scientific evidence, supports state's conclusion that ban of alcohol ads on billboards will directly advance state's interest in reducing consumption).[2]

---

[1] The designation "*Pet.*" refers to the petition for certiorari herein, and the designation "*App.*" refers to the appendix following the petition.

[2] The Fourth Circuit did not need to rest its decision upholding Baltimore's enactment entirely upon the inherent link between advertising and consumption, although that would have been a sufficient basis for upholding the law, because Baltimore generated a compelling legislative record, summarized *infra*, demonstrating that its law will directly and

Indeed, the Fourth Circuit was openly skeptical about the First Circuit's acceptance of the state's "common sense" argument in *44 Liquormart*, and questioned whether the relationship between price advertising and demand is any way more "inherent" than the relationship between disclosure of alcohol content and "strength wars" was found to be in *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1593 (1995). *See App.* 17a-18a, n.5.

Holding the instant petition for certiorari pending decision in *44 Liquormart*, or ordering reconsideration in this case in the event of a reversal of the First Circuit, would constitute a departure from this Court's practice and would unfairly delay implementation of Baltimore's enactment.[3] *Henry v. City of Rock Hall*, 376 U.S. 776, 777 (1964); *Board of Trustees v. Sweeney*, 439 U.S. 24, 26 (1978) (Stevens, J., dissenting) (entry of a summary reconsideration order is not appropriate "unless the intervening decision has shed new light on the law which, if it had been available at the time of the court of appeals' decision, might have led to a different result").

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materially advance its interest in promoting the temperance of minors. The judgement of the Fourth Circuit rests on both sound reasoning and substantial empirical support. *Cf. Turner Broadcasting System v. F.C.C.*, 114 S. Ct. 2445, 2471 (1994) (in excercising independent judgment when First Amendment rights are implicated Court will nevertheless accord substantial deference to predictive judgments of the legislature).

[3] Baltimore's law had an effective date of February 5, 1994. *App.* 4a. Petitioners challenged the enactment before its effective date, and Baltimore has consented to a stay of enforcement until Petitioners' appeal rights are exhausted.

B. Comment on Petitioners' Assertion Concerning the Scope of Judicial Review by the Courts Below

Petitioners perceive that the district court and the Fourth Circuit both eschewed the appropriate quality of independent judicial review and instead indulged the Baltimore City Council in acts of "rubber-stamping." *Pet.* 21. Petitioners' view of the scope of judicial review leads them to the absurd conclusion that the constitutionality of Baltimore's enactment can only be determined at trial after a battle of the experts; such a court battle must inevitably result in Petitioners' favor, they assert, because the evidence which the City Council expressly credited in passing the enactment would not even be admissible under this Court's holding in *Daubert v. Dow Merrell Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993). The social science reports credited in the Preamble to Baltimore's enactment must not be considered by the courts, Petitioners argue, because they "would be shown at trial to be unreliable and contrary to the mainstream of scientific thought." *Pet.* 15.

Baltimore's burden under the third and fourth prongs of *Central Hudson* was to "demonstrate" (not necessarily, as Petitioners insist, to prove at *trial*) that its enactment will advance the government's interest in a direct and material way, *id.* at 565; *Edenfield v. Fane*, 113 S. Ct. 1792, 1798 (1993); *Rubin*, 115 S. Ct. at 1588 (1995); *Florida Bar*, 115 S. Ct. at 2377 (1995), and that its enactment is "narrowly drawn," i.e. "not more extensive than is necessary" to serve the governmental interest, *Central Hudson*, 447 U.S. at 566; *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2705 (1993); *Florida Bar*, 115 S. Ct. at

2380. Contrary to Petitioners' argument, both of the lower courts correctly articulated Baltimore's burden and then held Baltimore to such burden.

A summary of the legislative record Baltimore relied upon to sustain its enactment is set forth below. Preliminarily, however, it is well to keep in mind that although government may not satisfy its burden under *Central Hudson* with "mere speculation and conjecture," *Edenfield*, 113 S. Ct. at 1798, this Court has "permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and 'simple common sense.' " *Florida Bar*, 115 S. Ct. at 2378 (citations omitted).

C. Summary of the Legislative Record Supporting Baltimore's Enactment

The legislative record consists of (1) the Preamble, (2) the social science reports referred to in the Preamble, and (3) the public testimony considered by the City Council before it passed Ordinance 288. *App.* 5a; 49a.

The problem of underage drinking is well known. Social science reports document the problem nationally and at the state and local level. The National magnitude of the problem is indicated in two reports acknowledged in the Preamble: Report by the United States Surgeon General (*Youth and Alcohol: Dangerous and Deadly Consequences*), and Report by the United States Inspector General (*Youth and Alcohol: Drinking and Crime*). *App.* 53a. The

extent of the problem at the state and local level is documented in the *1992 Maryland Adolescent Drug Survey*, conducted by the Maryland Department of Education, also acknowledged in the Preamble. *App.* 51a.[4]

The City Council considered whether the restrictions imposed by Ordinance 288 would directly advance the governmental goal of promoting the temperance and welfare of minors. First, citing several cases decided by this Court and lower federal courts, the City Council recognized judicial precedents establishing "the positive relationship between advertising and consumption." *App.* 50a. Second, citing *Packer Corp. v. Utah*, 285 U.S. 105 (1932), in which this Court upheld against an equal protection challenge a state law prohibiting tobacco advertising on billboards while allowing it in newspapers and magazines, the City Council recognized that "[o]utdoor advertisements are a unique and distinguishable medium of advertising which subjects [sic] the general public to involuntary and unavoidable forms of solicitation." *Id.* Third, the City Council cited with approval the findings contained in a report of the Prevention Committee of Governor William Donald Schaefer's Drug and Alcohol Abuse Commission, titled *The Impact of Alcohol Advertising and the Use of Alcohol in Television Programs and Films on Underage Drinking*. *App.* 51a.

Research studies, special reports, position papers and articles in media journals were thoroughly reviewed by the Prevention Committee, in an attempt to determine the

---

[4] Petitioners concede that promotion of the temperance of minors in Baltimore City is a substantial governmental interest. *Pet.* 7.

impact of alcohol advertising on underage drinking. JA 853.[5] The Prevention Committee concluded that exposure to alcohol advertising increases the likelihood that young people will develop attitudes favorable to drinking; in turn, those attitudes increase the likelihood that children will drink prior to age twenty-one.

The Prevention Committee's research revealed a number of specific alcohol industry practices that seem to contribute greatly to attitudes favorable to alcohol among youth, including: using advertisements that are especially appealing to children (i.e. cartoon characters); using rock stars and athletes as spokespersons; and associating beer drinking with activities that have great appeal to youth, such as race car driving, rock climbing and water sports. JA 856.

Reports and studies reviewed by the Prevention Committee led it to conclude that alcohol advertisers have settled on the "life-style" approach as the standard and most effective way to promote alcoholic beverage sales. The "most notable and most widely held belief – and therefore expectation – set forth in these advertisements about alcohol is that it is something of a 'magic elixir' that can enhance social and physical pleasure, sexual performance and responsiveness, power and aggression, and social competence." (*United States Department of Health and Human Services Seventh Special Report to the United States Congress on Alcohol and Health*). JA 866. Life-style advertisements extol the generic benefits of

---

[5] The designation "JA" refers to the joint appendix filed in the Fourth Circuit.

drinking rather than specific brand characteristics, according to research reviewed in the Prevention Committee report. *Id.*

The alcohol and advertising industries' positions regarding the impact of alcohol advertising on underage drinking were considered by the Prevention Committee *but rejected as being at variance with the finding of independent researchers.* JA 871. The report stated: "It must be noted that both the alcoholic beverage and the advertising industries allege that research shows no correlation between alcohol advertising and underage drinking when, in fact, the overwhelming majority of research studies showed a definite correlation." JA 872.

The report advocated that a public health approach be taken to preventing and reducing underage drinking. JA 856. Ordinance 288 reflects the City Council's deliberate decision to accept recommendation H. of the report:

> H. Encourage local communities to regulate alcohol advertisements on billboards.
>
> Many communities are inundated by billboards that advertise alcohol. Children are exposed to these ads on a regular basis simply by walking to school or playing in their neighborhood. There is no practical means of parental monitoring or limiting of exposure to these "public" advertisements. Local governments can, however, regulate these advertisements in the interest of the public health, limiting the number/density of such advertisements as well as their placement in residential areas, near schools, playgrounds, etc. [JA 860]

Before it enacted Ordinance 288 the City Council held a public hearing, which included testimony of proponents and opponents. JA 1089-1323. One expert testified in support of the bill which became Ordinance 288.

Dr. Mark Crispin Miller, co-Director of the Film and Media Studies Program at Johns Hopkins University, testified that liquor advertisements, including billboards, "deliberately target the young." JA 1134. Dr. Miller informed the City Council that over the last twenty years alcohol "advertising has shifted over toward an emphasis on the young." JA 1138. According to Dr. Miller, liquor advertisers now more than in the past use overt sexual themes. JA 1138-1141. Such themes are particularly effective with young people. *Id.* Dr. Miller testified:

> Those under 18 years old react more favorably to the sexual theme. And I would submit to you that the constant harping on sexual promise in these outdoor ads makes, makes this particularly appealing to the young who cannot help but see these images as they go about their business in the streets. Almost invariably there is an association of the liquor with a kind of masculine provocative, with the availability of women. [JA 1141]

REASONS FOR DENYING THE WRIT

I. THE FOURTH CIRCUIT'S HOLDING DOES NOT CONFLICT WITH THIS COURT'S DECISIONS

A. There is Neither Actual Nor Apparent Conflict Between the Fourth Circuit's Decision and This Court's Decisions.

This case presents no compelling reason for review by this Court. The Fourth Circuit's decision was animated by a studied application of the standards set forth in *Central Hudson*, and was decided with faithful reference to this Court's most recent pronouncement regarding commercial speech regulation, *Florida Bar*.

The Fourth Circuit's decision neither actually nor apparently conflicts with decisions of this Court. There is a large gulf between what this Court has held in its recent commercial speech decisions and Petitioners' interpretation of those decisions. That this Court has required the government to "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree," *Rubin*, 115 S. Ct. at 1592, certainly does not mean that the district court was required to hold a trial to test the validity of the predictive judgments of the Baltimore City Council in this case. Putting aside that the Fourth Circuit found "a logical nexus between the City's objective and the means it selected for achieving that objective," *App.* 16a, a finding based on common sense which is nowhere disputed in the Petition for Certiorari, Petitioners make the novel argument that *Daubert* should have led the lower courts to refuse to even consider the substantial legislative record and legislative findings which were generated before enactment of the challenged

ordinance. *See Pet.* 15. Petitioners' *Daubert* argument reveals the disparity between their view and the actual state of commercial speech jurisprudence. *See, e.g., Florida Bar,* 115 S. Ct. at 2378, *and see Turner Broadcasting System,* 114 S. Ct. at 2471.

This case hardly provides a compelling reason for review on the basis of conflict with decisions of this Court. Without even taking into account the sufficiency of the social science reports credited by the City Council to sustain Baltimore's burden under *Central Hudson,* this Court would easily affirm based upon the obvious common sense relationship between advertising and increased demand. Unless this Court is prepared to fundamentally depart from the methodology it employed to decide *Central Hudson* there is no reason for it to review this case. In *Central Hudson* this Court found "an immediate connection between advertising and demand for electricity," 447 U.S. at 569, and therefore a direct link between the ban on advertising and the state interest in conservation, *id.;* in *Dunagin* the Fifth Circuit stated that "[w]hether we characterize over disposition as following the judicial notice approach taken in *Central Hudson Gas* or following the 'accumulated, common-sense judgment' approach taken in *Metromedia [Inc. v. City of San Diego,* 453 U.S. 490 (1981)], we hold that sufficient reason exists to believe that advertising and consumption are linked to justify the ban [on billboards advertising hard liquor or wine in Mississippi], whether or not 'concrete scientific evidence' exists to that effect," *id.* at 250; and in the instant case the Fourth Circuit, coming to a similarly based conclusion concerning the correlation between alcoholic beverage advertising and underage drinking, held that "[t]here is a logical nexus between the City's

objective and the means it selected for achieving that objective." *App.* 16a.

* * *

Time and again this Court has spoken concerning government's burden in satisfying the *Central Hudson* third prong, and in so doing has upheld commercial speech restrictions based on legislative records far less complete or compelling than the one generated by Baltimore here. *See, e.g., Florida Bar,* 115 S. Ct. at 2378; *Edge,* 113 S. Ct. at 2704; *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico,* 478 U.S. 328, 341 (1986); *Metromedia,* 453 U.S. at 511 (plurality opinion of White, J.). Although this Court would easily find the legislative record supporting Baltimore's enactment sufficient to satisfy *Central Hudson,* it would not thereby either clarify the law or introduce any new legal standard.[6]

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[6] Petitioners' blindness to this Court's admonitions that the predictive judgments of legislatures are entitled to substantial judicial deference, and that a legislature "is not obliged, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review," *Turner Broadcasting System,* 114 S. Ct. at 2471, leads them to question whether it was appropriate for the Fourth Circuit to have affirmed the district court's resolution of this case at the pleadings stage. *Pet.* 11. The thrust of Petitioners' attack on the dismissal of their cases pursuant to Rule 12(b)(6) melts away, however, when it is remembered that their challenge is to the *facial* constitutionality of Baltimore's enactment, and that "the issue of whether there is a correlation between advertising and consumption is a legislative and not an adjudicative fact question." *Dunagin,* 718 F.2d at 748 n.8.

"Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have

* * *

Petitioners' argument based on the fourth prong of *Central Hudson* is no more than a mere assertion that the Fourth Circuit erred, without pretense that discretionary review by this Court would be of interest or importance to anyone other than themselves. In any event, there was no error. Baltimore's enactment is well tailored to achieve no more than its substantial objective. Adults are still permitted to receive Petitioners' advertising from signs in commercial areas of the City. The capacity of Baltimore to sponsor an educational campaign to teach children the danger of alcohol does not render the City's restriction of Petitioners' billboards too burdensome. This Court considered and rejected an identical "counterspeech" argument in *Posadas*, and in so doing cited with approval *Dunagin's* rejection of the same argument. 478 U.S. at 344.[7]

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relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body." Advisory Committee Note to Federal Rule of Evidence 201. Judicial access to legislative facts should be governed in accordance with the judicial methodology for determining the content of domestic law. The court may make an independent search for persuasive data or rest content with what it has or what the parties present. The parties do no more than assist; they control no part of the process. *Id.*, citing Morgan, *Judicial Notice*, 57 Harv. L. Rev. 269, 270-271 (1944). *Compare Metromedia*, 453 U.S. at 509 (despite inadequacy of record proof Court refuses to "disagree with the accumulated, commonsense judgements of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety").

[7] Despite Petitioners' assertion that *Posadas* has been overruled *sub silentio* by *Edenfield*, *see Pet.* 17, *Posadas* is still good law

B. The Governmental Interest Asserted by Baltimore is Exceptionally Strong, and Petitioners have Misstated that Interest.

At all times in this litigation Petitioners have conceded what any reviewing court would of necessity conclude: Baltimore asserts a substantial governmental interest in legislating to promote the temperance of minors. *Oklahoma Telecasters Association v. Crisp*, 699 F.2d 490, 500 (10th Cir. 1983), *rev'd on other grounds sub. nom. Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984) (state interest in reducing the sale and consumption of liquor is "exceptionally strong"); *Dunagin*, 718 F.2d at 747 ("alcohol abuse takes an enormous toll from society and the lives of many people").

Notwithstanding their concession, *Pet.* 7, Petitioners' denigrate Baltimore's purpose in enacting the challenged ordinance and the substantiality of the governmental interest sought to be promoted. Petitioners state:

> In these cases, Baltimore passed its Ordinance because billboard advertising for alcohol beverages is unpopular with a few vocal community groups, who actually may have been motivated by concerns other than underage drinking, such as "community empowerment." [*App.* 21]

Correctly identifying the actual governmental interest animating the legislation is important, however,

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and was quoted with approval in *Rubin*, 115 S. Ct. at 1591. Nor has this Court adopted a "least restrictive means" approach to commercial speech restrictions, although that approach best explains Petitioners' argument. *Florida Bar*, 115 S. Ct. at 2380.

because the protection available for particular commercial expression "turns on the nature both of the expression and the governmental interests served by the regulation." *Central Hudson*, 447 U.S. at 563. Far from Petitioners' assertion that Baltimore's law was passed because of its popularity with "a few vocal community groups," the law was actually passed after Baltimore received a specific delegation of legislative authority from the *Maryland General Assembly* to enact remedial legislation suggested by the *Governor's Drug and Alcohol Abuse Commission*. *App.* 4a-5a; 54a.

The Prevention Committee of the Governor's Commission recommended that to combat underage drinking communities regulate alcoholic beverage advertising on billboards. *Id.* Baltimore's ordinance, therefore, was the result of plenary consideration and approval by both the state legislature and a blue ribbon commission even *before* its consideration and enactment by the City Council of Baltimore. It hardly follows that Petitioners – who mistakenly characterize the harm inflicted by their products and messages as merely "unpopular with some voters," *Pet.* 21 – were the victims of a witch-hunt foisted upon them by a "part-time [legislature] . . . [that] lacked the means to engage in thorough fact-finding." *Id.*

Petitioners cite a *Wall Street Journal* article to the effect that this case is being closely watched by other cities considering regulation of advertising for "unpopular" products. *Pet.* 21. That may be, but in the absence of any conflict between the Fourth Circuit's decision and a decision of this Court or a United States Court of Appeals there is no compelling justification for Supreme Court review. Petitioners' fear that purveyors of "unpopular"

products will become the victims of legislation passed by innumerable legislatures held hostage by "a few vocal community groups" is unsubstantiated. Indeed, one of the most notable purveyors of an "unpopular" product has already decided to *voluntarily* desist from an ad campaign widely criticized as targeting minors. *The Baltimore Sun* reported that: "Advertising icon Joe Camel will be yanked from billboards by cigarette maker R.J. Reynolds amid a hail of criticism that the ads are blatantly aimed at convincing children to smoke." *RJ Reynolds To Pull Joe Camel From Billboards,* Balto. Sun, Oct. 27, 1995, at 4C.

Petitioners' argument touting the importance of this case on the basis of a national increase in restrictions on commercial speech regarding "unpopular" products (i.e. tobacco and alcohol) is significantly undercut when one observes so dominant a speaker as R.J. Reynolds beginning to voluntarily restrict its commercial speech. The possibility that similar self-policing will emerge as a trend among commercial speakers promoting alcohol and tobacco militates against this Court expending precious judicial resources on this case.

II. THERE IS NO CONFLICT BETWEEN THE DECISION OF THE FOURTH CIRCUIT AND DECISIONS OF THE CIRCUIT COURTS INVOLVING THE SAME MATTERS OF LAW AND FACT

As the Fourth Circuit observed before expressly aligning itself with the Fifth and Tenth Circuits, "[e]ach circuit that has considered the regulation of alcoholic beverage advertising has likewise concluded that the regulation of advertising is reasonably aimed at reducing

demand." *App.* 17a (citing *Dunagin* and *Crisp*). There is uniformity among the circuits in cases involving the same matter of law and fact as involved here.

The decisions relied upon by Petitioners to demonstrate a conflict among the circuits do not even exhibit conflicting dicta or a conflict in principle with the Fourth Circuit's decision. It is difficult to see how the Ninth Circuit's decision in *Cal-Almond, Inc. v. United States Department of Agriculture*, 14 F.2d 429 (9th Cir. 1993) can be considered to conflict (even in principle) with the Fourth Circuit's decision when the Ninth Circuit cited *Posadas* with approval and for the proposition that "[t]he Supreme Court assumes as a matter of law that advertising increases consumption of the product or service being advertised." 14 F.3d at 439 (emphasis added).[8]

It is similarly disingenuous for Petitioners to claim that the Tenth Circuit's approach to commercial speech cases conflicts in principle with that of the Fourth Circuit. Petitioners' reliance on *Adolph Coors Co. v. Bentsen*, 2 F.3d 355, 357 (10th Cir. 1993) (*Coors II*), *aff'd sum nom. Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995), is wholly misplaced. In light of this Court having written a plenary decision in the case the decision of the Tenth Circuit is superseded. Yet, even the principles applied in the superseded Tenth Circuit opinion are consistent with the Fourth Circuit's opinion herein. *See Coors II*, 2 F.3d at 357

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[8] *Association of National Advertisers, Inc. v. Lungren*, 44 F.3d 726 (9th Cir. 1994), *cert. denied*, 64 U.S.L.W. 3240 (U.S. Oct. 2, 1995) is another Ninth Circuit case relying on *Posadas* and otherwise in harmony with the principles expressed by the Fourth Circuit in this case. *See* 44 F.3d at 733.

("*Edenfield* . . . articulates a standard that is consistent with our pronouncements in *Coors I*") *and Adolph Coors Co. v. Brady*, 944 F.2d 1543, 1549-1550 (10th Cir 1991) (*Coors I*) (approving *Dunagin*).

The last case relied upon by Petitioners involved issues of law and fact not remotely similar to those involved in the instant case. In *MD II Entertainment Inc. v. City of Dallas*, 28 F.3d 492 (5th Cir. 1994) a law prohibiting, *inter alia*, use of the term "gentleman's club" to advertise a topless bar could not withstand scrutiny under the third prong of *Central Hudson* since it appeared that "[i]n formulating its ordinance, the city relied on *no studies* showing a link between advertising and property values or crime." 28 F.2d at 496 (emphasis added). Baltimore, in contrast, implemented the recommendation of a blue-ribbon commission appointed by the Governor. Insofar as judicial recognition of the link between alcohol advertising and consumption is concerned, however, the Fifth Circuit's decision in *Dunagin*, not that in *MD II Entertainment*, continues to be the last word.

CONCLUSION

For the foregoing reasons Respondents respectfully request that the Petition for a Writ of Certiorari be denied.

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November, 1995

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No. 95-685

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ANHEUSER-BUSCH, INC. and PENN ADVERTISING OF BALTIMORE, INC.,
Petitioners,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE CITY; KURT L. SCHMOKE, in his official capacity as Mayor of Baltimore City; CITY COUNCIL OF BALTIMORE CITY; and DAVID TANNER, in his official capacity as the General Superintendent of Zoning Administration and Enforcement,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONERS' REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-685

ANHEUSER-BUSCH, INC. and PENN ADVERTISING OF BALTIMORE, INC.,

Petitioners,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE CITY; KURT L. SCHMOKE, in his official capacity as Mayor of Baltimore City; CITY COUNCIL OF BALTIMORE CITY; and DAVID TANNER, in his official capacity as the General Superintendent of Zoning Administration and Enforcement,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' REPLY BRIEF

PRELIMINARY STATEMENT

The City of Baltimore's brief in opposition strongly reinforces our arguments for granting the petition by demonstrating the wide gap between the interpretation of the *Central Hudson* [1] test espoused by the Fourth Circuit and that which has so clearly emerged from this Court's recent commercial speech decisions.

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[1] *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

The principal theme of Baltimore's opposition is that a government that imposes a ban on commercial speech should be insulated from any meaningful review by a court. Serious and substantial First Amendment challenges to the ban, Baltimore argues, may be properly dismissed *on the pleadings* solely by reference to (i) the self-serving recitations, "studies" and opinions noted in the legislative record—material of unknown reliability never subjected to cross-examination—and (ii) the alleged "common sense" of the legislative body. Although the third and fourth prongs of the *Central Hudson* test are inescapably fact-intensive, Baltimore urges that the courts' duty of judicial review under those prongs begins and ends with acceptance at face value of the assertions made by the enacting body at the time the ban is passed.

Baltimore's brief also illustrates another thesis of our petition: there are two fundamentally different approaches to the scope of judicial review of commercial speech restrictions in the circuits. One approach, represented in its most extreme version by the Fourth Circuit's decision, effectively transforms the intermediate scrutiny standard of *Central Hudson* into a highly deferential "rational basis" test in which the government always wins. The other takes *Central Hudson* principles, elaborated by this Court's application of the test in *Florida Bar, Rubin, Ibanez, Edenfield* and *Discovery Network,* as requiring that commercial speech restrictions be subjected to a meaningful level of judicial scrutiny in the crucible of an adversarial evidentiary record. Under the latter approach, the trier of fact must find that the government has met its burden of *demonstrating* that the restriction *in fact* directly and materially advances its asserted interest and that the interest could not be served as well by obvious and reasonable alternatives with less or no impact on speech.

In its brief, Baltimore studiously avoids addressing the two levels of conflict identified in the petition. Instead,

Baltimore concentrates on a premature argument of the merits of these cases. This reply brief returns to the focus of the petition: the stark conflicts in this important area of First Amendment law between the Fourth Circuit's decision and the decisions of this Court and other circuit courts.[2]

I. BALTIMORE'S RESPONSE EVADES AND LEAVES UNRESOLVED THE CONFLICT BETWEEN THE FOURTH CIRCUIT AND THIS COURT AS TO THE JUDICIARY'S ROLE IN PROTECTING COMMERCIAL SPEECH RIGHTS

Baltimore does not dispute that this Court's recent commercial speech decisions are a product of meaningful judicial review of the evidentiary record created by the government to satisfy the *Central Hudson* test and by the challenger to refute the government's showing. *See, e.g., Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995); *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696 (1993); *Edenfield v. Fane*, 113 S. Ct. 1792 (1993); *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993). Nor does Baltimore even claim that the Fourth Circuit engaged in such judicial review, a claim that would be refuted by the Circuit Court's explicit statement that a legislature's "findings" that purportedly satisfy *Central Hudson* are not subject to "judicial review under a clearly erroneous standard or otherwise" (App., *infra*, 11a), and by its refusal to allow any development of an evidentiary record. Clearly the Fourth Circuit's de-

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[2] Baltimore speculatively argues that this petition should not be held pending the eventual decision in *44 Liquormart, Inc. v. Rhode Island*, 115 S. Ct. 1821 (U.S. 1995) (No. 94-1140) (decision pending), because that decision will not justify a summary reconsideration order in these cases. Brief in Opp. at 1-3. As explained in the petition, however, it is not at all clear whether *44 Liquormart* will be determinative in these cases. Petition at 22-23. Moreover, if Baltimore's prediction is proved correct and the *44 Liquormart* decision does not shed substantial light on the troubling and important issues raised by the Fourth Circuit's decision, then the case for granting this petition is enhanced.

cision directly conflicts with this Court's decisions as to the role of the judiciary in protecting commercial speech rights. This overarching conflict in constitutional theory permeates the three more practical, subsidiary conflicts, discussed below, concerning how the courts should apply the *Central Hudson* test.

A. The Dismissal under Rule 12(b)(6)

The Fourth Circuit's dismissal of petitioners' well-pleaded complaints under Rule 12(b)(6) conflicts with this Court's repeated statements that the government, not the challenger, bears the burden of proof under *Central Hudson*. *See, e.g., Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1592 (1995). Baltimore does not dispute that the Fourth Circuit is the only federal court that has ever dismissed a commercial speech challenge under Rule 12(b)(6). Further, and more fundamentally, Baltimore does not contest that the Fourth Circuit's approach will result in the routine dismissal of commercial speech challenges on the pleadings without any opportunity for the challengers to test the government's "proof" or submit contrary evidence. Instead, Baltimore attempts to defend the Fourth Circuit's unprecedented Rule 12(b)(6) approach, dramatically underscoring its grave implications for First Amendment rights.

Baltimore contends that dismissal under Rule 12(b)(6) is appropriate because the courts must treat a government's asserted justifications for restricting commercial speech as "legislative facts," not "adjudicative facts." Brief in Opp. at 12-13 n.6. This is just another attempt to justify the Fourth Circuit's abdication of the courts' First Amendment duty to hold government to its burden of proof under *Central Hudson*. Petitioners submit—and will brief more fully if this petition is granted—that the factual inquiries raised by *Central Hudson*'s third and fourth prongs are properly characterized not as "legislative facts," but as "adjudicative facts," which are "the ultimate facts in the case, plus those evidential facts that

are sufficiently central to the controversy that they should be left to the [trier of fact] unless clearly indisputable." 21 Charles A. Wright & Kenneth W. Graham, *Federal Practice & Procedure* § 5103 at 478 (1977 & Supp. 1995); *see* Fed. R. Evid. 201(a) advisory committee's note.[3]

The Fourth Circuit's unique Rule 12(b)(6) approach conflicts with this Court's First Amendment jurisprudence (*see Discovery Network*, 113 S. Ct. 1505), the Federal Rules of Evidence (*see Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2795 (1993)) and Rule 12(b)(6) itself (*see Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). Contrary to Baltimore's "strawman" argument, petitioners are not asking this Court to declare the Ordinance unconstitutional at the pleading stage. *See* Brief in Opp. at 4. Rather, petitioners respectfully urge the Court to review the Fourth Circuit's unprecedented Rule 12(b)(6) decision because, left untouched, it would encourage other courts to cut off First Amendment challenges regardless of what is alleged in a complaint and without any testing of the government's "proof."

B. The Third Prong: Direct and Material Advancement

Baltimore also does not dispute that a conflict exists between the Fourth Circuit's decision and this Court's recent decisions concerning the third prong of *Central Hudson*. This Court requires a government to demonstrate "in fact" that its restriction on speech "directly and materially" advances its asserted purpose, whereas the Fourth Circuit required Baltimore to show only that it "reasonably" believed that a "logical nexus" exists be-

[3] Baltimore also asserts that Rule 12(b)(6) dismissal is appropriate because, in its unsubstantiated view, petitioners raised only facial, and not as-applied, challenges to the Ordinance. Brief in Opp. at 12 n.6. Baltimore simply ignores petitioners' demonstration that they raised both types of challenges (Petition at 5 n.4) and does not explain why a facial challenge should be subject to Rule 12(b)(6) dismissal.

tween its restriction and its asserted purpose. App., *infra*, 14a, 16a. Instead of addressing that conflict, Baltimore argues the merits of these cases, and in so doing, reinforces the importance of granting this petition to clarify the duty of the judiciary under the third prong.

In a premature effort to show this Court that it satisfied the third prong, Baltimore offers the same lengthy recitation of the legislative history of its Ordinance that was relied on by the Fourth Circuit. Brief in Opp. at 5-9. But that legislative history, and particularly what is missing from it, further underscores the Fourth Circuit's misunderstanding of its duty under *Central Hudson*. Nowhere in that history is there any evidence of how the Ordinance, with its myriad exceptions, in fact will affect the exposure of Baltimore's minors to outdoor advertising for alcohol beverages. Nor is there any evidence concerning the extent to which Baltimore's minors will continue to be exposed to alcohol beverages in every other advertising medium and in the social settings of contemporary life. Because the Fourth Circuit did not have before it any evidence on these issues, its decision cannot possibly be harmonized with this Court's decisions that require the judiciary to hold the government to a "demonstration in fact" standard of proof under the third prong. *See Rubin*, 115 S. Ct. at 1592 (*citing Edenfield*, 113 S. Ct. at 1800); *Discovery Network*, 113 S. Ct. 1505; *see also Turner Broadcasting Sys., Inc. v. F.C.C.*, 114 S. Ct. 2445, 2471-72 (1994) (remanding First Amendment case to district court because, in the Court's "independent judgment of the facts," the government had not met its burden of proof).

Notwithstanding its several attempts, Baltimore fails to make the conflict on the third prong disappear. Baltimore is plainly wrong when it states that the Fourth Circuit "articulated" and held Baltimore to the *Edenfield* "demonstration in fact" standard. Brief in Opp. at 4-5. The Fourth Circuit never articulated anything close to

that standard, and instead applied its own "reasonable belief" standard. App., *infra*, 14a, 16a. Baltimore also argues that the Fourth Circuit merely followed this Court's decision in *Central Hudson*, which recognized an "immediate connection between advertising and demand for electricity." Brief in Opp. at 11. Neither the record nor the decision in *Central Hudson* supports the Fourth Circuit because plaintiffs there did not challenge New York's assertion that its restriction on advertising to promote usage would reduce consumption of electricity. In contrast, petitioners explicitly alleged that Baltimore's elimination of a small fraction of alcohol beverage advertising—without affecting any other social influences—will not directly and materially reduce illegal underage drinking. App., *infra*, 74a.

In a final attempt to deny the conflict created by the Fourth Circuit's decision, Baltimore claims that the Fourth Circuit was permitted to use "common sense" to find that the government had satisfied the third prong. But it is certainly not "common sense" that reducing minors' exposure to some outdoor advertising for alcohol beverages, while leaving all other alcohol beverage advertising and social influences untouched, will directly and materially reduce illegal underage consumption. *See Discovery Network*, 113 S. Ct. 1505. Further, even if that purported cause-and-effect relationship made sense intuitively to the Fourth Circuit, that court's process conflicted with this Court's established practice of allowing challengers of First Amendment restrictions to submit evidence that might belie "common sense" assumptions. *See* Petition at 12. In short, the Fourth Circuit's "reasonable belief" approach to the third prong cannot be reconciled with this Court's *Edenfield* standard, and that conflict alone merits the granting of this petition.

C. The Fourth Prong: No More Extensive Than Necessary

Baltimore does not dispute that the Fourth Circuit's decision conflicts with this Court's holdings in *Discovery*

Network, *Florida Bar* and *Rubin* concerning the fourth prong. In defiance of those decisions, the Fourth Circuit held that Baltimore's failure to address "obvious less-burdensome alternatives" to its restriction on speech was beyond judicial review. *See* Petition at 15-17. But Baltimore professes ignorance as to why that holding "would be of interest or importance to anyone other than [petitioners]." Brief in Opp. at 13. Obviously, the Fourth Circuit's radical rewriting of the fourth prong to eliminate enforcement of the government's burden of proof is of vital importance to all commercial speakers and the public.

II. BALTIMORE DOES NOT DISPUTE THAT A FUNDAMENTAL CONFLICT EXISTS IN THE CIRCUIT COURTS AS TO THE APPLICABLE STANDARD OF PROOF UNDER THE "DIRECT AND MATERIAL ADVANCEMENT" PRONG OF *CENTRAL HUDSON*

In purporting to discuss the conflict in the circuits that was identified by petitioners, Baltimore appears to be addressing a petition different from the one that we filed.[4] Petitioners demonstrated that the Fifth, Ninth and Tenth Circuits have held government to the *Edenfield*

[4] Baltimore irrelevantly claims that there is no conflict in the circuits as to the *results* in cases challenging restrictions on alcohol beverage advertising. But the two other decisions that it identifies are of no value because they depend upon the erroneous notion that the Twenty-first Amendment somehow reduces the government's burden under *Central Hudson*. *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738, 750 (5th Cir. 1983) (*en banc*), *cert. denied*, 467 U.S. 1259 (1984); *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490, 498 (10th Cir. 1983), *rev'd on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984). Indeed, Baltimore's reliance on the *Dunagin* and *Crisp* decisions is inconsistent with its attempt to distinguish the First Circuit's decision in *44 Liquormart* on the ground that it is dependent on the Twenty-first Amendment. Brief in Opp. at 2. In any event, Baltimore's result-driven analysis misses the point that *Central Hudson* requires each case to be decided based on the particular restriction being challenged and the evidentiary record developed in the trial court.

"demonstration in fact" standard for the third prong, whereas the First and Fourth Circuits have applied a "reasonable belief" standard based on their reading of this Court's earlier decisions in *Posadas* and *Metromedia*. Petition at 17-19. Yet neither of these irreconcilable standards is discussed anywhere in Point II of Baltimore's brief. That silence speaks volumes: the existence of this important and unsettling conflict in the circuits is beyond dispute.

CONCLUSION

The petition for a writ of certiorari should be granted.

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No. 95-685

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OCTOBER TERM, 1995

ANHEUSER-BUSCH, INC., and PENN ADVERTISING OF BALTIMORE, INC.,

Petitioners,

—v.—

MAYOR AND CITY COUNCIL OF THE CITY OF BALTIMORE, *et. al.* ,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., IN SUPPORT OF PETITIONERS

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Interest of *Amicus Curiae*

Pursuant to Supreme Court Rule 37.2, the Association of National Advertisers, Inc. (ANA) respectfully submits this brief *amicus curiae* in support of petitioners' application for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit. All parties have consented to the filing of this brief. Letters of consent will be lodged with the clerk of the Court.

ANA is the industry's oldest trade association and the only organization exclusively dedicated to serving the interests of corporations that advertise regionally and nationally. ANA's membership is a cross-section of American industry, consisting of manufacturers, retailers and service providers. Representing more than 5,300 separate advertising entities, ANA's member companies market a kaleidescopic array of products and services to consumers and other businesses. As the nation's principal community of commercial speakers, ANA has long been committed to the advancement of commercial speech designed to permit consumers to make informed and autonomous choices in the marketplace. ANA has appeared as *amicus curiae* in this Court in numerous cases involving commercial speech.

The Issues Raised by the Decisions of the Courts Below

ANA is mindful of the extraordinary nature of a brief *amicus curiae* at the certiorari stage. The issues raised by the petition in this case are, however, so critical to the continued viability of constitutionally protected commercial speech, that participation at the certiorari stage of this case appears appropriate. The decision of the Fourth Circuit upholding a ban on outdoor advertising of alcohol in much of the City of Baltimore raises three critical issues. First, the courts below declined to conduct an independent review of the claimed factual justification for Baltimore's massive exercise in cen-

sorship. Instead of the searching judicial review of the factual justification for censorship that is a hallmark of the modern First Amendment, the courts below, in disregard of the holdings of this Court, asked merely whether the Baltimore City Council had a rational basis for its decision to impose massive censorship. *City of Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505, 1510, n.13 (1993); *Edenfield v. Fane*, 113 S.Ct. 1792 (1993); *Ibanez v. Florida Dep't of Business and Professional Regulation*, 114 S.Ct. 2084 (1994).

Second, the courts below refused to consider whether it was actually necessary for Baltimore to engage in massive censorship of truthful speech aimed at adults in order to advance its ostensible purpose of reducing underage consumption of alcohol. For example, the Baltimore City Council did not seriously consider whether vigorous law enforcement and increased education would adequately advance its governmental interests, without a need for massive censorship. *Amicus* believes that Baltimore's failure to have seriously considered non-censorship approaches to the problem renders the decision to invoke censorship constitutionally suspect. *Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585 (1995). Even if, however, one assumes that resort to some form of speech regulation was permissible, Baltimore was under an obligation to consider more narrowly tailored regulations that would avoid massive censorship of adults. *Peel v. Att'y Registration & Disc. Comm'n*, 496 U.S. 91 (1990).

Third, Baltimore used its legitimate concern with children as a device to leverage itself into a position to censor vast quantities of material aimed at adults. When, as here, concern for children is used as a stalking horse to justify widespread censorship of material designed for adults, the society risks diluting the level of discourse to the lowest common denominator. *Sable Communications v. FCC*, 492 U.S. 115 (1991).

Reasons for Granting the Writ

I.

BALTIMORE HAS IMPERMISSIBLY USED A LEGITIMATE CONCERN FOR CHILDREN AS A PRETEXT TO IMPOSE CENSORSHIP ON THE ENTIRE COMMUNITY

It is, *amicus* suggests, no coincidence that significant contemporary debates about censorship revolve around the question of how to protect children without sacrificing speech aimed at adults. Whether one is concerned with sexually explicit speech on the Internet, violence on television, or billboards in Baltimore, the First Amendment challenge is the same—to assure that legitimate concern for children does not ripen into a blueprint for the widespread censorship of adults.

Unfortunately, in this case, Baltimore has used an ostensible desire to reduce underage consumption of alcohol as a thinly-disguised device to impose widespread censorship on truthful speech aimed at adults. *Sable Communications v. FCC*, 492 U.S. 115 (1991). Although Baltimore's sole asserted interest in censorship is a desire to protect young people, Baltimore's ban, viewed as device to protect children, is both radically over- and under-inclusive, casting serious doubt on its true purpose.

Baltimore's scheme is overinclusive because the City has made virtually no effort to "narrowly tailor" its ban to children. Instead, the City seeks to use concern for children as a transparent device to censor what adults may read.

While the requirement of "narrow tailoring" in a commercial speech context does not require mechanical invalidation of a regulation merely because other alternatives may exist, *Board of Trustees v. Fox*, 492 U.S. 469 (1989), it does require a careful effort to avoid unnecessary censorship. *Peel v. Att'y Registration & Disc. Comm'n*, 496 U.S. 91 (1990).

Nowhere is that careful effort more important than when the volatile issue of the welfare of children is the asserted justification for censorship of speech aimed at adults. While *amicus* does not believe that persuasive data exists identifying outdoor advertising as a material cause of underage drinking[1], even if one assumes for the sake of argument that some children might be unduly influenced by certain outdoor advertisements, no basis exists to ban all off-site outdoor advertisements for alcohol in Baltimore's residential neighborhoods.

This Court has repeatedly invalidated similar efforts to impose the standards of children on what adults may read. In *Sable Communications v. FCC*, 492 U.S. 115 (1991), for example, Congress banned so-called "dial-a-porn" services used by adults in order to shield children from the morally degrading material. This Court unanimously invalidated the ban, ruling that Congress had failed to demonstrate that a flat ban on lawful speech directed to adults was necessary to protect children.[2]

The Court's refusal in *Sable Communications* to permit a legitimate concern with children to be parlayed into a full-blown device to censor adults was not new law. In *Butler v. Michigan*, 352 U.S. 380 (1957), a unanimous Supreme Court invalidated a Michigan statute that forbade the public distribution of books, pictures and movies potentially harmful to minors. Justice Frankfurter, in invalidating the law, ruled that

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[1] In 1985, the Federal Trade Commission rejected the identical argument, fnding that no persuasive data linked advertising to underage abuse of alcohol. The FTC study, among others, is described in the Joint Appendix submitted to the Fourth Circuit. JA 175-76; 1177-78.

[2] In *Sable Communications*, the Court distinguished its "narrow" holding in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) upholding a ban on offensive radio broadcasts during the afternoon, noting that *Pacifica* imposed a mere "time, place or manner" restriction, as opposed to a flat ban on the speech. In addition, *Pacifica* was explicitly based on the claimed existence of enhanced regulatory power over the broadcast media.

it was "not reasonably restricted to the evil with which it is said to deal", *id* at 388, because it reduced adults to reading only that which is fit for children. Similarly, in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), the Court struck down a postal ban on unsolicited birth control advertisements directed to the home, holding that concern for children could not justify a broad-based ban on material directed to adults.

As the Court recognized in *Sable Communications*, unless would-be censors are held to a rigorous standard of narrow tailoring in child-protective settings, the temptation to use children as a stalking horse for censorship of adults will become overwhelming. That is precisely what happened in this case.

The inexplicable underinclusiveness of Baltimore's censorship scheme reinforces the suspicion that concern with children is being used as a cover for censorship of speech aimed at adults. A censorship scheme genuinely designed to protect children simply would not exempt advertisements in Camden Yards and Memorial Stadium, or on public transportation.[3] The internal contradictions of a scheme that claims to protect children by exempting advertisements in ballparks, in downtown shopping malls, and on the buses children ride to school makes it all but impossible to take Baltimore's child protection rationale seriously. *Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585 (1995).[4]

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[3] In order to ban advertisements of lawful products from any public place, a would-be censor must satisfy the stringent requirements of the third prong of the *Central Hudson* test. As *amicus* has noted, no reliable data exists linking truthful advertising to unlawful behavior by children. Thus, *amicus* believes that efforts to ban controversial advertisements from sports stadia or public transportation would violate the First Amendment.

[4] The exemption of state-run ballparks and public transit facilities from the Maryland enabling law raises yet another constitutional issue, since the censorship scheme discriminates between governmental and non-governmental speakers. Under Baltimore's scheme, governmental

II.

THE FOURTH CIRCUIT FAILED TO SUBJECT THE FACTUAL UNDERPINNINGS OF BALTIMORE'S CENSORSHIP SCHEME TO RIGOROUS, INDEPENDENT JUDICIAL SCRUTINY

The hallmark of modern First Amendment protection is a rigorous, independent review by the judiciary of the factual underpinnings of any decision to censor protected speech. Eg. *Turner Broadcasting System, Inc., v. FCC,* 114 S.Ct. 2445 (1994); *Landmark Communications, Inc,. v. Virginia,* 435 U.S. 829 (1978). As this Court recently held in *Turner Broadcasting*, the judiciary is obliged to conduct an independent review of the legislature's factual basis for censorship in order to assure that First Amendment rights are adequately preserved, even when such an independent review brings the judiciary into conflict with Congress.

Unfortunately, the court below abdicated its responsibility to look carefully at the factual basis for Baltimore's massive exercise in censorship, claiming that it lacked power to review so-called "legislative facts" "found" by the Baltimore City Council after one day of public hearings. 63 F.3d at 1311-12. Instead, the court below asked merely whether the Baltimore City Council could have held a rational belief that its censorship scheme had a "logical nexus" to the problem of underage drinking. *Id* at 1313-1314.

But such an unduly deferential "rational basis" standard confuses judicial review of censorship of speech with judicial review of the regulation of behavior and has been explicitly

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entities are permitted to continue to derive revenue from beverage advertising at the ballpark and on public transportation, but private speakers are flatly banned. Baltimore cannot create a government monopoly over certain categories of advertising by outlawing the bulk of private competition. *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 112 S.Ct. 501 (1991); *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538 (1992).

rejected by this Court in commercial speech cases. See *City of Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505, 1510, n.13 (explicitly rejecting rational basis review in commercial speech settings); *Edenfield v. Fane*, 113 S.Ct. 1792 (1993); *Ibanez v. Florida Dep't of Business & Professional Regulation*, 114 S.Ct. 2084 (1994). Ordinarily, the majority may regulate behavior in the rational hope that regulatory activity may bring about a desired social result. *Wisconsin v. Mitchell*, 113 S.Ct. 1811 (1993). Where, however, constitutionally protected speech (truthful outdoor advertising aimed at adults) is the target of a censor because of content-based allegations that its message leads to undesirable behavior (underage drinking), the majority must do more than assert a rational hope that sweeping censorship of adults will reduce underage misbehavior., 113 S.Ct. 1792 (1993) *Edenfield v. Fane*, 113 S.Ct. 1792 (1993); *Ibanez v. Florida Dep't of Business & Professional Regulation*, 114 S.Ct. 2084 (1994); *Central Hudson Gas & Electric Corp. v. Pub. Svc. Comm'n*, 447 U.S. 557 (1980).

Especially where, as here, the volatile issue of protection of children is asserted as the sole justification for content-based censorship of a particular message intended for adults, government must do more than merely assert a rational basis for censorship. A would-be censor must demonstrate that censorship of adults is genuinely necessary to protect children before reducing public discourse to the level of the sandbox. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983). Thus, when legislative assertions of fact underlie a decision to censor, due regard for principles of separation of powers require a reviewing court to make an independent assessment of the factual sufficiency of the case for censorship.

That is the critical lesson of the Holmes/Brandeis refusal to accept the "bad tendency" test in First Amendment cases. There is, at bottom, absolutely no difference between the Fourth Circuit's formulation of its standard of review in this case and the "bad tendency" test rejected by Justices Holmes

and Brandeis in *Gitlow v. New York*, 268 U.S. 652 (1925). Unfortunately, while both the Baltimore City Council and the courts below purported to apply the rigorous First Amendment "directly and materially advance" test, they actually resurrected the discredited "bad tendency" test as the only way to uphold the Baltimore speech ban.

III.

THE FOURTH CIRCUIT REFUSED TO CONSIDER WHETHER MORE NARROWLY TAILORED ALTERNATIVES WOULD ADVANCE BALTIMORE'S ASSERTED INTEREST IN PROTECTING CHILDREN WITHOUT MASSIVE CENSORSHIP

The Fourth Circuit recognized a duty to consider whether less drastic alternatives existed to Baltimore's censorship scheme. 63 F.3d at 1316. The court below then proceeded to refuse to consider two sets of less drastic alternatives.

The court below explicitly declined to consider whether the non-censorship options of vigorous law enforcement and increased community education were adequate alternatives, making it unnecessary to resort to censorship at all. Moreover, the court then failed to consider whether less drastic speech regulations such as: (1) geographical restrictions focusing on signs within 500 feet of schools and playgrounds; or (2) density restrictions limiting the number of outdoor signs in a given neighborhood would be sufficient to advance Baltimore's interest in reducing underage consumption of alcohol.

Amicus believes that no effort to deal with underage drinking can succeed without a serious commitment to law enforcement and community education. Baltimore's failure to explore such non-censorship alternatives renders a resort to censorship as a substitute for law enforcement and community education unconstitutional. Moreover, whatever one's view of the relative efficacy of censorship in dealing with underage drink-

ing, it is clear that numerous alternatives exist to a ban on outdoor advertising except in commercial areas. For example, many communities have experimented with bans on signs within 500 feet of schools and playgrounds. Others have considered density regulations limiting the concentration of signs. *Amicus* believes that serious questions exist about whether even such narrowly tailored bans would satisfy the third prong of the *Central Hudson* test. Unfortunately, neither the Baltimore City Council, nor the courts below, made an effort to determine whether such obvious alternatives rendered it unnecessary to engage in massive censorship of adults. The requirement of narrow tailoring that is the core of the fourth prong of the *Central Hudson* requires, at a minimum, that Baltimore be required to demonstrate why the existence of such obvious alternatives to widespread censorship were ignored. *Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585 (1995).

Conclusion

The petition for certiorari herein should be granted.

Dated: November 10, 1995
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ANHEUSER-BUSCH, INC., *et al.*,
Petitioners,

v.

MAYOR AND CITY COUNCIL
OF BALTIMORE CITY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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IN THE
SUPREME COURT OF THE UNITED STATES
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ANHEUSER-BUSCH, INC., *et al.*,
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center with more than 100,000 supporters nationwide. Among the constitutional rights that WLF defends in judicial and administrative proceedings is the right of commercial free speech. To

that end, WLF has often appeared before this Court and other federal and state courts as an *amicus* in commercial free speech cases, including *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993); *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 496 U.S. 91 (1990); *Pacific Gas & Elec. Co. v. Public Utility Comm'n*, 475 U.S. 1 (1986); and *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530 (1980).

Here, the Fourth Circuit's approach to the third prong of the *Central Hudson* test not only upheld a content-based ban on expression, but did so without even a minimal opportunity for Petitioners to engage in discovery and to present evidence. The Fourth Circuit's rationale, if followed widely by lower courts and other circuits, could lead to widespread denial of commercial speech rights.

All parties to this action have consented to WLF's participation. Consent letters from counsel have been lodged with the Clerk of the Court.

SUMMARY OF ARGUMENT

The decision below upheld, against First Amendment challenge, a content-based prohibition on certain signs in Baltimore, Maryland, while disregarding evidence which Petitioners proffered on the issue of the *Central Hudson* test. The City of Baltimore's criminal ordinance substantially restricts the outdoor advertising of alcoholic beverages pursuant to a scheme that can best be characterized by the recent words of this Court in *Rubin v. Coors Brewing Company*, 115 S. Ct. 1585, 1593 (1995): "a unique and puzzling regulatory framework" permeated by "irrationality." In their challenge to the Ordinance, Petitioners were denied the opportunity to impeach the

City's evidence of cause and effect between alcohol advertising and consumption. This case is, then, the next logical step beyond *Rubin* and others, where this Court found that the legislature had relied on little or no empirical evidence. The issue here is the appropriate standard for judging the evidentiary basis upon which the legislature professes to rely.

Since *Central Hudson*, the Circuits have split between requiring, as this Court most recently did in *Rubin*, that "a governmental body seeking to sustain a restriction on commercial speech must *demonstrate* that the harms it recites are real and that its restriction will *in fact* alleviate them to a material degree," 115 S. Ct. at 1592 (quoting *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993)) (emphasis supplied), and requiring merely, in the words of the Fourth Circuit, that it be "*reasonable* for the legislative body to conclude that its goal would be advanced in some material respect by the regulation." *See* Appendix to Petitioners' Petition for Writ of Certiorari at 14a (emphasis supplied) (hereafter "Pet. App."). The lack of a clearly defined standard encourages courts to choose the approach that most likely comports with their own policy views. Moreover, even in a complex case, the approach taken by the Fourth Circuit would, as acknowledged by another Circuit which took the same approach, allow truthful and undeceptive advertising information to be prohibited based merely on the trial judge's (and presumably the legislature's) "own knowledge and common sense." *See Dunagin v. City of Oxford, Miss.*, 718 F.2d 738, 747 (5th Cir. 1983) (en banc), *cert. denied*, 467 U.S. 1259 (1984).

The Fourth Circuit erroneously assumed that there are only two alternatives under *Central Hudson*'s third prong: unbridled judicial involvement in reviewing legislative

determinations as to the Ordinance's direct and material advancement of its goal, or total judicial deference in commercial free speech cases. So long as this Court continues to subscribe to the *Central Hudson* intermediate scrutiny approach,[1] a reasonable middle ground exists, which this Court should now clarify, to prevent *both* wholesale judicial second-guessing *and* blanket judicial endorsement of legislative conclusions. Such an approach preserves meaningful review to ensure protection of the legitimate exercise of First Amendment commercial speech rights. The Fourth Circuit's approach, in contrast, amounts to no review at all.

ARGUMENT

I. The Fourth Circuit's Failure to Hold the City to Its Burden of Proof Exemplifies the Problems Stemming from the Disarray Among the Circuits in Interpreting the Third Prong of the *Central Hudson* Test.

The burden is on the government to justify regulation of commercial speech that concerns a lawful activity and is not misleading. A municipality must: (1) assert a substantial interest in support of its regulation; (2) demonstrate that the regulation advances that interest "in a direct and material way"; and (3) demonstrate that the asserted government interest could not "be served as well by a more limited restriction on commercial speech." *Edenfield v. Fane*, 113 S. Ct. 1792, 1798 (1993); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447

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[1] The alternative is the approach advocated by Justice Stevens in his concurring opinion in *Rubin*. *See* 115 S. Ct. at 1594.

U.S. 557, 564 (1980). As the Fourth Circuit correctly recognized, the dispute in this case revolves around whether Baltimore has proper justification for its Ordinance under the latter two of these factors — commonly known as the third and fourth prongs of *Central Hudson*'s four-prong standard of "intermediate scrutiny" review for commercial speech. *See* Pet. App. at 13a; *Rubin*, 115 S. Ct. at 1591.

The Fourth Circuit, in determining that Baltimore's Ordinance met the *Central Hudson* test for the restriction of commercial speech, stated:

> There is a *logical nexus* between the City's objective and the means it selected for achieving that objective, and it is not necessary, in satisfying *Central Hudson*'s third prong, to prove conclusively that the correlation in fact exists, or that the steps undertaken will solve the problem. . . . The proper standard for approval must involve an assessment of the *reasonableness* of the legislature's belief that the means it selected will advance its ends.

Pet. App. at 16a-17a (emphasis supplied). On this basis, the Fourth Circuit declined to consider even the barest contrary evidence that Petitioners submitted — an even more extreme approach than other circuits that have adopted a "reasonableness" test. *See, e.g., Dunagin*, 718 F.2d at 738; *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490 (10th Cir. 1983), *rev'd on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984).

In interpreting *Central Hudson*'s standard as one requiring only a "logical nexus" and a "reasonable belief"

that the means will directly and materially advance the end, the Fourth Circuit reduced the *Central Hudson* test from one of "intermediate scrutiny" to one of mere "rational basis" review, as evidenced by its refusal to even look at contrary, compelling evidence. Such an approach flies in the face of this Court's pronouncements regarding the proper review of commercial speech regulations: the legislature is required in an intermediate level of constitutional review to "demonstrate that the harms it recites are real and that a restriction will in fact alleviate them to a material degree." *Rubin*, 115 S. Ct. at 1592 (quoting *Edenfield*, 113 S. Ct. at 1800). *See also Ibanez v. Florida Dep't of Business & Professional Regulation*, 114 S. Ct. 2084, 2089 (1994).

The straying of the Fourth Circuit from this Court's standard is not unique. Since *Central Hudson*, and even since *Edenfield* and its progeny clarifying *Central Hudson*'s standard, lower courts have exhibited some confusion regarding the third and fourth prongs and the requisite level of intermediate scrutiny. Some circuit courts have approached regulation of commercial speech by requiring the government to put forth empirical proof, under a "preponderance of the evidence" burden, to demonstrate the requisite direct and material advancement of the asserted goal. *See, e.g., MD II Entertainment, Inc. v. City of Dallas*, 28 F.3d 492 (5th Cir. 1994); *Cal-Almond, Inc. v. United States Dep't of Agriculture*, 14 F.3d 429 (9th Cir. 1993); *Adolph Coors Co. v. Bentsen*, 2 F.3d 355 (10th Cir. 1993), *aff'd sub nom. Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995). Others, however, have delegated their constitutional mandate to protect the First Amendment to the legislature, and have refused to subject the government to a "preponderance of the evidence" burden. *See, e.g., Dunagin*, 718 F.2d at 738; *Crisp*, 699 F.2d at 490.

The latter approach has reached its nadir here. The Fourth Circuit's Rule 12(b)(6) dismissal of Petitioners' First Amendment challenge to a regulation of protected commercial speech may apparently be without precedent (*see* Petition at 11). Indeed, the Fourth Circuit overruled the trial court judge who had at least tried to give a paltry semblance of fairness by converting the motion to one for summary judgment. The Fourth Circuit's pleading stage dismissal was inevitable given the continuing practice of some lower courts to interpret *Central Hudson*'s standard as a lower level, "rational basis" review — a standard, ironically, that amounts to judicial activism by forsaking the duty of the judiciary in First Amendment cases to the court's sympathy with legislative policy.

Despite its inevitability, such a dismissal stands in stark contrast to this Court's repeated statements that deference to legislative findings simply cannot limit judicial inquiry where significant Constitutional principles are at stake. *See Sable Communications of California, Inc.* v. FCC, 492 U.S. 115, 129 (1989); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978); *Scheuer v. Rhodes*, 416 U.S. 232, 236, 249 (1974). *See also Housing Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc.*, 943 F.2d 644, 651 n.9 (6th Cir. 1991). We therefore respectfully urge this Court to grant certiorari in this case for purposes of clarifying how the lower courts should exercise the intermediate scrutiny required under *Central Hudson*, and how governments seeking to regulate commercial speech can meet the burden of proof imposed by *Central Hudson*.

II. The Fourth Circuit's Refusal To Consider Petitioners' Evidence, in Disregard of *Central Hudson*, Sets a Dangerous Precedent.

Baltimore has asserted that its Ordinance "restricting the placement of advertisements for alcoholic beverages in publicly visible locations within Baltimore City is necessary for the promotion of the welfare and temperance of minors exposed to such advertisements." Pet. App. at 54a. Baltimore's Ordinance contains a preamble which sets forth, as support for the alleged "necessity" of the Ordinance, select judicial opinions and excerpts from a limited number of state and federal government reports. Pet. App. at 50a-54a.

On this basis, the court below dismissed Petitioners' suit on the pleadings. But this case is not one properly resolved even at the summary judgment stage, let alone dismissed on the pleadings. Petitioners were entitled to the opportunity to show that the City of Baltimore's grounds for its decision to circumscribe the First Amendment rights of alcohol advertisers and legitimate adult consumers were derived from political and/or controverted sources. Petitioners were entitled to the opportunity to obtain and present evidence that the case law and four studies cited in the Ordinance's Preamble and legislative history, contrary to the Fourth Circuit's conclusion, do not "demonstrate in fact" that the restriction of outdoor signs advertising alcoholic beverages "directly advances" Baltimore's campaign against underage drinking.

Moreover, it is not proper for a court to uphold a restriction on speech based on indiscriminate "judicial notice" of the restriction's direct and material advancement of its goal. For every opinion that takes judicial notice of

a positive correlation between advertising and behavior, another exists which requires more than a "legislature's commonsense judgment," which the Fourth Circuit found sufficient here, that the regulation will directly and materially advance the governmental interest. Pet. App. at 15a-16a. *See, e.g., Linmark Assoc. v. Township of Willingboro*, 431 U.S. 85 (1977) (holding that an ordinance prohibiting "For Sale" or "Sold" signs on residential property was not justified by municipality's perception that such a prohibition would reduce the flight of white homeowners from a racially integrated neighborhood); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (holding that a prohibition of contraceptive advertising was not justified on grounds that ads would legitimize sexual activity of young people).

Here, the City of Baltimore was selective in choosing its evidence. For instance, nowhere on its list appears the contrary 1990 conclusion of the Federal Trade Commission ("FTC"), an independent agency which has scrutinized alcohol advertising for decades. In testimony before the U.S. House of Representatives Commerce Committee, the FTC noted:

> The Commission believes that the evidence is inconclusive on the issue of the linkage between alcohol advertising and consumption. There are studies that appear to support either position, and this same conclusion is expressed in the recent report on alcohol and health by the Department of Health & Human Services.

See Health Warnings on Alcoholic Beverage Advertisements: Hearing on H.R. 4493 Before the Subcomm. on Transportation and Hazardous Materials of

the House Comm. on Energy and Commerce, 101st Cong., 2d Sess. 35-41, at 37 (1990) (prepared statement of the FTC) (citing U.S. Dept. of Health and Human Services, *Alcohol and Health* 211-12 (1990)). The FTC suggested that the inconclusiveness of the evidence may be due to the limits of the available research methodology, *id.*; if true, this observation further underscores that Petitioners here should have had an opportunity to impeach the City's evidence.[2]

In deciding to take "judicial notice" of assumptions made by Baltimore in its own favor, and to rely unquestioningly on reports chosen by Baltimore for inclusion in the Ordinance's legislative history, the Fourth Circuit has set a troubling precedent. If, based on limited evidence, a legislature may indeed properly determine that advertising on signs increases children's consumption of any product that the government may regulate for health reasons, then under the Fourth Circuit's rationale, a legislature may properly restrict such advertising (or other forms of advertising) without meaningful judicial review.

Thus, Baltimore's selective evidence, if left unchallenged, might be taken to justify a ban on certain products displayed in movies. *See, e.g.*, M.L. Miller, *Note: The First Amendment and Legislative Bans of Liquor and Cigarette Advertisements*, 85 Colum. L. Rev. 632, 651 (1985). Similarly, recent medical studies suggest that if children's eating habits do not change early in life, obese children are likely to become obese adults susceptible to

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[2] For the Court's convenience, a copy of the FTC's statement before the House Energy and Commerce Committee, cited herein, has been lodged with the Clerk of the Court.

early death and a variety of diseases. *See, e.g.*, S. Squires, *For U.S. Youth, Weight Becomes Growing Problem*, Wash. Post, Oct. 3, 1995, at A1; S.S. Gidding et al., *Improving Children's Heart Health: A Report From The American Heart Association's Children's Heart Health Conference*, 65 J. School Health 129 (Apr. 1995); M. Corey, *Sizing Up A Generation*, Balt. Sun, Mar. 19, 1995, at 1K (noting that top ten foods purchased by teen-agers are gum, ice cream, fast-food hamburgers, chocolate candy, pizza, nonchocolate candy, breath mints, cookies, hard candies and potato chips). Under the Fourth Circuit's deferential reasoning, Baltimore could properly restrict outdoor signs of high-fat "junk" foods, such as fast-food french fries, snackcakes and candy, should it so desire. Surely, the third prong of *Central Hudson* is not as flaccid as the Fourth Circuit's opinion would indicate. If the lower courts disregard *Edenfield*'s clarification of the *Central Hudson* test, the First Amendment will be subordinated to every community's evolving attitudes. The First Amendment, however, is and must be grounded on a firmer foundation.

Because the Fourth Circuit deferred to Baltimore's judgment without question at the pleading stage, it prevented the discovery necessary to develop a record comparing the actual number of advertisements affected by Baltimore's Ordinance with the actual number remaining in the city subject to the view of minors. Thus, the type of evidence critical to this Court's decisions in *Rubin* and *Discovery Network* does not even exist in this case. This case therefore goes well beyond the common issue of whether an appellate court "correctly" resolved a First Amendment challenge after considering the parties' respective evidence, because the Fourth Circuit abdicated its Constitutional responsibility of judicial inquiry.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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PENN ADVERTISING OF BALTIMORE, INC.,

Petitioners,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE; KURT L. SCHMOKE, in his official capacity as Mayor of Baltimore City; CITY COUNCIL OF BALTIMORE CITY; and DAVID TANNER, in his official capacity as the General Superintendent of Zoning Administration and Enforcement,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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ARGUMENT

This supplemental brief in opposition is filed in light of *44 Liquormart, Inc. v. Rhode Island*, No. 94-1140 (1996 WL 241709, decided May 13, 1996). The decision in that case provides no proper occasion for entry here of a summary reconsideration order. The premises upon which the Fourth Circuit decided this case are not undercut by the rationale in any of the separate opinions in *44 Liquormart*. Remand for further consideration is not warranted. *See, Lawrence v. Chater*, 116 S.Ct. 604, 607 (1996) (*per curiam*).

Both factually and legally, the instant case is far removed from *44 Liquormart*. The Fourth Circuit did not rely on the flawed decision of the First Circuit, and indeed was openly sceptical of the rationale employed by that court. *Pet. App.* 17a-18a. In upholding Baltimore's limited restriction on the placement of billboards advertising alcohol, the Fourth Circuit placed no reliance on the 21st Amendment, nor the "greater includes the lesser" reasoning of *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 354-346 (1986), nor on the notion that speech jurisprudence includes a "vice exception." The Fourth Circuit's opinion adheres faithfully to *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), which in the aftermath of *44 Liquormart* remains the standard binding on all lower courts.

The principal opinion in *44 Liquormart* teaches that " 'special care' should attend the review of . . . blanket bans" of commercial speech. *44 Liquormart*, 1996 WL 241709 *9, quoting *Central Hudson*, 447 U.S. at 566. Unlike

the blanket ban involved in *44 Liquormart*, the instant case involves a *limited* restriction on the location of billboards, and allows ample alternative means for *billboard* advertising. Thus, even with reference to the rationale of part V of the opinion authored by Justice Stevens, this is a case for application of less than strict review. The Fourth Circuit did, however, hold Baltimore to its burden of demonstrating beyond mere speculation and conjecture that its restriction would advance its concededly substantial purpose. The Fourth Circuit found that Baltimore met its burden by reference to studies showing a definite correlation between alcohol advertising and underage drinking, which is a method of proof endorsed by this Court. *Florida Bar v. Went For It, Inc.*, 115 S.Ct. 2371, 2378 (1995).

Unlike *44 Liquormart* and *Posadas*, this case does not involve a speech ban which screens from public view the underlying governmental policy. Baltimore's purpose is to reduce underage drinking. The most direct method to achieve that goal – banning the *sale* of alcohol to minors – has been tried without adequate success. Because Baltimore found, based on competent evidence, that a direct regulation of alcohol is insufficient to dampen demand by minors, its reasonably tailored and limited restriction on speech promoting alcohol is permissible. *Cf. 44 Liquormart*, 1996 WL 241709 *18 (Thomas, J., concurring in part and concurring in the judgment) and *19 (O'Connor, J., concurring in the judgment).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ANHEUSER-BUSCH, INC. and PENN ADVERTISING OF BALTIMORE, INC.,
Petitioners,
v.
MAYOR AND CITY COUNCIL OF BALTIMORE CITY; KURT L. SCHMOKE, in his official capacity as Mayor of Baltimore City; CITY COUNCIL OF BALTIMORE CITY; and DAVID TANNER, in his official capacity as the General Superintendent of Zoning Administration and Enforcement,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL BRIEF

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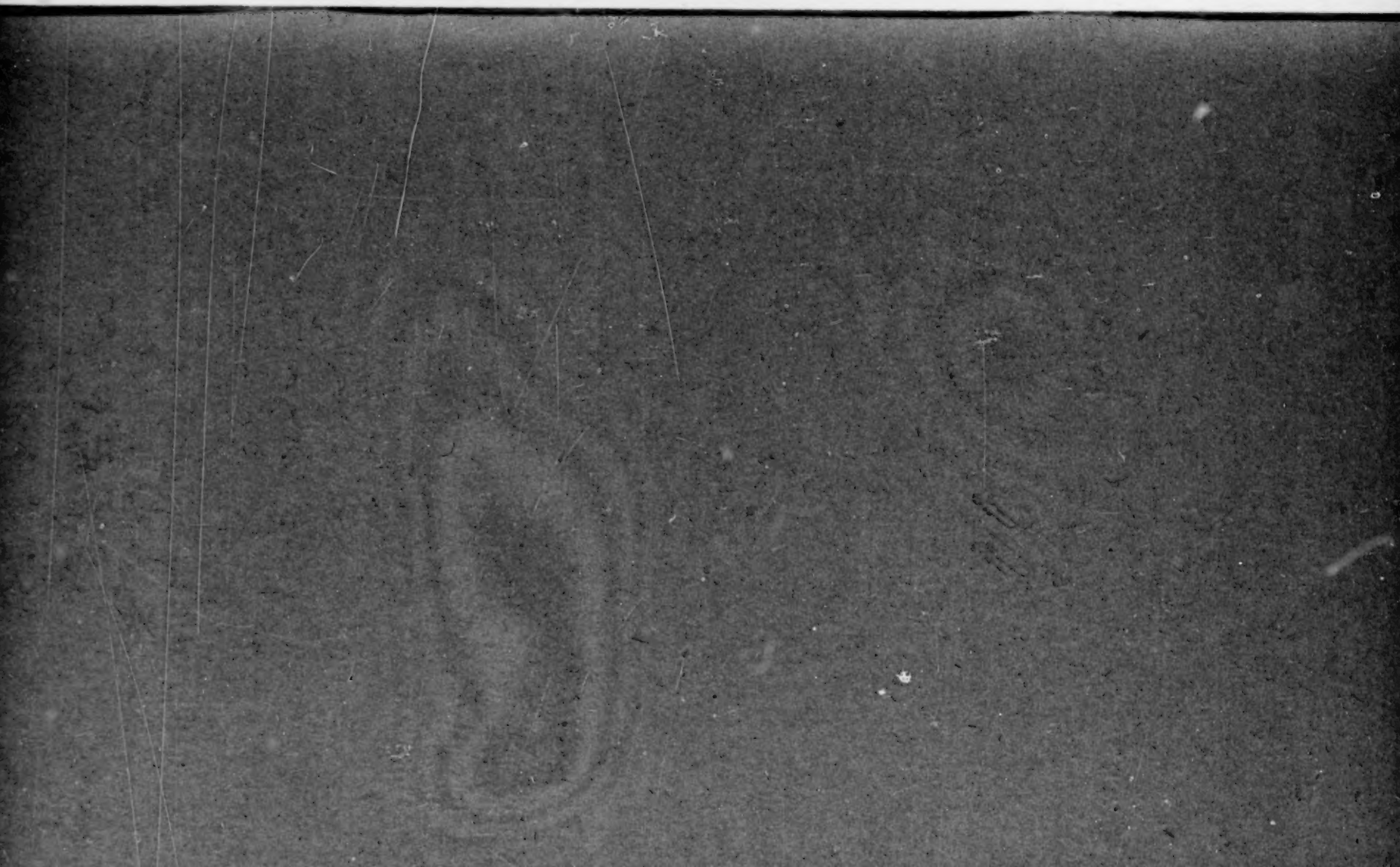

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SUPPLEMENTAL BRIEF

The Court's decision in *44 Liquormart, Inc. v. Rhode Island*, No. 94-1140 (U.S. May 13, 1996), underscores the errors in the Fourth Circuit's unconstitutionally deferential approach to legislative restrictions on commercial speech. Whereas the opinions of the Justices make plain that the minimum protection to be afforded commercial speakers is a vigorous application of the *Central Hud-*

son * test, the Fourth Circuit mistakenly applied a weakened version of that test, relying on the now explicitly superseded decision in *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986). The Fourth Circuit erred by deferring unquestioningly, in the context of a motion to dismiss under Fed. R. Civ. P. 12(b)(6), to the Baltimore City Council's purported justification for its restriction on commercial speech, on a record which contained no independent findings of fact or, for that matter, any developed evidence. Accordingly, this petition should be granted, the Fourth Circuit's decision should be summarily reversed, and the case should be remanded to the district court for discovery, findings of fact and further proceedings consistent with the Court's decision in *44 Liquormart*. *See Turner Broadcasting Sys., Inc. v. F.C.C.*, 114 S. Ct. 2445, 2472 (1994) (remanding First Amendment case to district court to allow development of a "more thorough factual record" because the government had not met its burden of proof).

A majority of the Court in *44 Liquormart* concluded that *Posadas* is not useful as precedent for defining the *Central Hudson* test. Slip op. (Stevens, J.) at 23-24; slip op. (O'Connor, J.) at 4-5. *Posadas* stood alone among the Court's commercial speech decisions as limiting judicial review to the acceptance "as reasonable, without further inquiry," of a government's purported justification for restricting speech. Slip op. (O'Connor, J.) at 4. *44 Liquormart* thus makes clear that *Central Hudson* is not satisfied by the apparent "reasonableness" of a legislative restriction on speech; rather, the courts must hold the government to its burden of proof by independently scrutinizing the evidence in a developed record.

The Fourth Circuit, however, used the "reasonableness" approach and did so in a manner even less protec-

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* *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

tive of free speech than the First Circuit did in *44 Liquormart*, holding that legislative findings cannot be subjected to "judicial review under a clearly erroneous standard or otherwise." App., *infra*, 11a. The court thus refused on Rule 12(b)(6) motions to give any weight to the well-pleaded allegations in the complaints, instead deferring completely to Baltimore's legislative "findings." If the Fourth Circuit had applied an appropriate level of First Amendment protection—whether it be as described in *44 Liquormart* by Justice Stevens, Justice Thomas or Justice O'Connor—it necessarily would have concluded that Baltimore did not satisfy either the third prong or the fourth prong of *Central Hudson* on its motions to dismiss.

In conflict with *44 Liquormart*, the Fourth Circuit described the inquiry under the third prong in highly deferential terms. Relying on *Posadas*, the Fourth Circuit stated that the inquiry is "whether it was *reasonable* for the legislative body to conclude that its goal would be advanced in some material respect by the regulation." App., *infra*, 14a-15a (emphasis supplied). As explained above, this "reasonableness" approach is not the law. Like the First Circuit in *44 Liquormart*, the Fourth Circuit erred in concluding that the government satisfied its burden of proof under the third prong even though there were no "findings of fact, or . . . evidentiary support" on the relevant issues. Slip op. (Stevens, J.) at 19. If Baltimore had been required to submit evidence, it would not have been able to prove that its ordinance will significantly reduce underage drinking, especially in light of the numerous exceptions to the ordinance for locations such as Memorial Stadium and Camden Yards baseball stadium. *See* Petition at 4-5.

Turning to the fourth prong, the Fourth Circuit again cited to *Posadas* as precedent for it to abstain from independent fact-finding. App., *infra*, 20a. The court declined to require Baltimore to prove why it could not use non-speech-related alternatives to achieving its asserted

goal, such as educational programs about risks associated with alcohol consumption, or better enforcement of existing laws that prohibit the sale of alcohol beverages to minors. The Fourth Circuit stated that "it is not an acceptable response to the approach taken by the City of limiting advertising exposure to say that the City must abandon altogether an approach that directly advances its goal." *Id.* Thus, the Fourth Circuit mistakenly did not allow for the development or submission of any evidence under the fourth prong.

44 Liquormart squarely rejects such a deferential approach to the fourth prong. A majority of the Court emphasized that the government has the burden of proving why it should be allowed to restrict speech when non-speech-related alternatives are available. Slip op. (Stevens, J.) at 21; slip op. (O'Connor, J.) at 2-3. Moreover, the Court specifically identified educational programs, like those that the Fourth Circuit declined to consider, as an alternative that must be addressed by the government before it can justify a restriction on advertising for alcohol beverages. *Id.*

44 Liquormart stands for the proposition that a government cannot justify a restriction on commercial speech unless a preponderance of the evidence is in its favor. It also reinforces the proposition that the courts below must scrutinize the evidence in making independent findings of fact. The First Amendment requires nothing less. The Fourth Circuit erred by deferring completely to Baltimore's legislative "findings," instead of requiring it to meet its evidentiary burdens on the third and fourth prongs of *Central Hudson*, and by blocking petitioners from developing or submitting any contrary evidence on their First Amendment claims.

CONCLUSION

The petition should be granted, the Fourth Circuit's decision should be summarily reversed, and the case should be remanded to the district court for discovery, findings of fact and further proceedings consistent with the Court's decision in *44 Liquormart, Inc. v. Rhode Island*, No. 94-1140 (U.S. May 13, 1996).

Respectfully submitted,

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